COPY

(1)

Supreme Court, U.S.
FILED

No. 02 687 OCT 30 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN POOLE, Warden, *Petitioner,*

v.

GLORIA KILLIAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-2785
Fax: (916) 324-2960
Counsel for Petitioner

1-HBP

QUESTIONS PRESENTED

1. Is summary reversal, in light of *Horn v. Banks*, ___ U.S. ___, 122 S.Ct 2147 (2002), warranted where the Ninth Circuit refused to consider the State's argument that *Teague v. Lane*, 489 U.S. 288 (1989) barred application of a new rule that a due process violation may result from perjury even where the prosecution has no knowledge that the testimony is false?

2. When a criminal defendant, in an effort to create an impression that she cooperated with police, introduces evidence that she voluntarily accompanied police downtown, waived her *Miranda* rights, and spoke with police for two hours, but stopped talking upon her arrest, and the prosecution responds by suggesting that the defendant's invocation of her right to silence reflected a lack of cooperation, is the state court denial of relief "contrary to" the prohibition against referencing a defendant's post-arrest silence announced in *Doyle v. Ohio*, 426 U.S. 610 (1976), within the meaning of 28 U.S.C. § 2254(d)(1)?

3. When a state court is presented with factual allegations of perjury, and denies habeas relief, may a federal court reviewing the same claim under the AEDPA deny all deference to the state court adjudication merely because the federal court conducted an evidentiary hearing?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE APPLICABLE TO THE CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT REFUSED TO PERFORM THE THRESHOLD ANALYSIS REQUIRED UNDER TEAGUE V. LANE, 489 U.S. 288 (1989)	5
II. *DOYLE* DOES NOT PROHIBIT A PROSECUTOR FROM CHALLENGING A DEFENDANT'S ATTEMPT TO PORTRAY HERSELF AS COOPERATIVE WITH POLICE, AND THEREFORE, THE STATE COURT DECISION DENYING RELIEF WAS NEITHER CONTRARY TO NOR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW	8
A. United States Supreme Court Precedent	9

TABLE OF CONTENTS (continued)

Page

B. The State Court Decision Was Not "Contrary To" United States Supreme Court Precedent 11

C. The State Court Decision Was Not An Unreasonable Application Of United States Supreme Court Precedent 12

III. THE NINTH CIRCUIT DECISION COMPLETELY IGNORED THE STATE COURT ADJUDICATION IN CONTRAVENTION OF THE AEDPA 15

CONCLUSION 18

INDEX OF APPENDICES 19

TABLE OF AUTHORITIES

Page

Cases

Aiken v. Spalding
841 F.2d 881 (9th Cir. 1988) 17

Anderson v. Charles
447 U.S. 404 (1980) 10, 11, 13, 14

Briscoe v. LaHue
460 U.S. 325 (1983) 6

Cruz-Sanchez v. Rivera-Cordero
835 F.2d 947 (1st Cir. 1987) 6

Doyle v. Ohio
426 U.S. 610 (1976) i, 5, 9-14

Earnest v. Dorsey
87 F.3d 1123 (10th Cir. 1996) 13

Fletcher v. Weir
455 U.S. 603 (1982) 10

Graham v. Wilson
828 F.2d 656 (10th Cir. 1987) 6

Grieco v. Hall
641 F.2d 1029 (1st Cir. 1981) 13

Horn v. Banks, ___ U.S. ___
122 S.Ct 2147 (2002) i, 7

TABLE OF AUTHORITIES (continued)

	Page
In re Clark 5 Cal.4th 750 21 Cal.Rptr.2d 509 (1993)	16
In re Romero 8 Cal.4th 728 35 Cal.Rptr.2d 270 (1994)	16
Jenkins v. Anderson 447 U.S. 231 (1980)	10, 11
Kibbe v. Dubois 269 F.3d 26 (1st Cir. 2001)	8, 14
Killian v. Poole 282 F.3d 1204 (9th Cir. 2002)	1, 2
McMillan v. Gomez 19 F.3d 465 (9th Cir. 1994)	13
Miranda v. Arizona 384 U.S. 436 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966)	3, 9-11
Mooney v. Holohan 294 U.S. 103 (1935)	6
Napue v. Illinois 360 U.S. 264 (1959)	6
People v. *Duvall* 9 Cal.4th 464 37 Cal.Rptr.2d 259 (1995)	16

TABLE OF AUTHORITIES (continued)

	Page
Rose v. Lundy 455 U.S. 509 (1982)	16
Teague v. Lane 489 U.S. 288 (1989)	i, 7, 16
United States v. Agurs 427 U.S. 97 (1976)	6
United States v. Chagra 735 F.2d 870 (5th Cir. 1984)	6
United States v. Gant 17 F.3d 935 (7th Cir. 1994)	13
United States v. Harris 498 F.2d 1164 (3rd Cir. 1974)	6
United States v. Kaufman 803, F.2d 289, 290 (7th Cir. 1986)	6
United States v. McCord 509 F.2d 334 (D.C. Cir. 1974)	6
United States v. Meinster 619 F.2d 1041 (4th Cir. 1980)	6
United States v. Miranne 688 F.2d 980 (5th Cir. 1982)	6
United States v. Petrillo 821 F.2d 85 (2nd Cir. 1987)	6

TABLE OF AUTHORITIES (continued)

	Page
United States v. Reveles 190 F.3d 678 (5th Cir. 1999)	13
United States v. Scholl 166 F.3d 964 (9th Cir. 1999)	13
United States v. Shue 766 F.2d 1122 (7th Cir. 1985)	13
United States v. Willis 759 F.2d 1486 (11th Cir. 1985)	6
United States v. Wolf 813 F.2d 970 (9th Cir. 1987)	6
United States v. Young 17 F.3d 1201 (9th Cir. 1994)	7
Wernert v. Arn 819 F.2d 613 (6th Cir. 1987)	6
Williams v. Taylor 529 U.S. 362 (2000)	8, 11, 12

Court Rules

Rules of the Supreme Court of the United States	
Rule 14(d)	1
Rule 35.3	1

TABLE OF AUTHORITIES (continued)

	Page
Other Authorities	
28 U.S.C	
§ 1254(1)	2
§ 2254	2, 4
§ 2254(b)(1)	16
§ 2254(d)	2, 15, 17
§ 2254(d)(1)	i, 8, 12, 15, 16
§ 2254(d)(2)	17
AEDPA	5, 14, 17

IN THE SUPREME COURT OF THE UNITED STATES

No.

SUSAN POOLE, Warden, *Petitioner,*

v.

GLORIA KILLIAN, *Respondent.*

OPINION BELOW[1/]

Petitioner, Susan Poole,[2/] Warden, California State Prison, Frontera (hereafter, "Warden"), represented by the State of California (the State), respectfully petitions for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Ninth Circuit in *Killian v. Poole*, 282

---

1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

2. Susan Poole is no longer the warden of California State Prison, Frontera. She has recently been succeeded by John Dovey, who was confirmed shortly after the Ninth Circuit issued its opinion in this case. Pursuant to Rule 35.3 of the Rules of the Supreme Court of the United States, Warden Susan Poole requests that this Court automatically substitute John Dovey for Susan Poole as Petitioner in the instant case.

F.3d 1204 (9th Cir. 2002), rehearing denied August 2, 2002 (No. 00-16477) (hereafter "*Killian*") (Appendices A and B), which reversed the judgment of the United States District Court for the Eastern District of California dismissing the application for a writ of habeas corpus of Respondent Gloria Killian (hereafter, "Killian").

The Warden has included the following orders and opinions as Appendices: (A) the Ninth Circuit's March 13, 2002, *Killian* order and opinion; (B) the Ninth Circuit's August 2, 2002, order denying rehearing and rehearing en banc; (C) the August 28, 1987, opinion of the California Court of Appeal, Third Appellate District, affirming Killian's conviction on direct appeal; (D) the February 28, 2000, Findings and Recommendations of the Magistrate Judge; (E) the May 17, 2000, Order by the district court adopting the Findings and Recommendations; (F) The September 17, 1997, denial of the petition for writ of habeas corpus by the California Supreme Court.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. On March 13, 2002, the Ninth Circuit entered its order and opinion in *Killian v. Poole*, 282 F.3d 1204, and, on August 2, 2002, denied rehearing and rehearing en banc. (Appendices A and B.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE APPLICABLE TO THE CASE

28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Grace and Edward Davies were murdered in their Sacramento home on December 9, 1981. Killian was questioned about the crime on December 16, 1981. She initially waived her *Miranda*[3] rights, and spoke for two hours. The police then arrested her, and she invoked her right to counsel. (Appendix D at 57.) At trial, in his opening statement, defense counsel sought to portray Killian as cooperative and therefore innocent. He pointed out that Killian had "consented to go downtown" with police and "voluntarily talked to the officers until they told her that she was going to be placed under arrest," at which point she declined to speak any further. (RT 701-702.)

During the prosecution's case in chief, defense counsel cross-examined a police officer, and elicited testimony that Killian had been read her *Miranda* rights, and had waived them and spoken to officers. (RT 505-506.) The prosecutor objected to the questioning, and at a bench conference, warned defense counsel that he was opening up the area by implying that she was cooperating, whereupon defense counsel stated he

---

3. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

would be cautious to avoid opening that door. (RT 506-507.) On direct examination, Killian testified that she went downtown with police voluntarily (RT 961), was advised of her rights and that she agreed to talk to them for what "seemed like hours." (RT 963.) She testified that she understood her constitutional rights, and decided not to talk any further once the police decided to arrest her. (RT 963.) (See, generally, Appendix D at 60.) On cross-examination, the prosecutor sought to probe Killian's true reasons for ending the conversation. (Appendix D at 57-59.)

On February 26, 1986, a jury in California state court found Killian guilty of first degree felony murder, attempted murder, burglary, two counts of robbery, grand theft, and conspiracy. Killian was sentenced on April 28, 1986, to state prison for 7 years for attempted murder, and for a consecutive term of 25 years to life for the murder conviction. The California Court of Appeal, Third Appellate District, affirmed Killian's conviction. (Appendix C.)

Nine years later, on November 4, 1996, Killian filed a petition for writ of habeas corpus in the California Supreme Court; after briefing by the parties, on September 17, 1997, the California Supreme Court denied the petition on the merits. (Appendix F.)

On October 27, 1997, Killian filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same issues as were raised in Killian's state habeas petition. On March 31, 1998, The Warden filed an answer. An evidentiary hearing was held on July 12, 1999, and on February 29, 2000, Magistrate Judge Gregory C. Hollows issued a 67-page order (Findings and Recommendations) recommending that the petition be denied. (Appendix D.) On May 17, 2000, District Judge Garland E. Burwell adopted the Findings and Recommendations in full (Appendix E); judgment denying the petition was entered on the same date.

Killian appealed and, after briefing and oral argument, the Ninth Circuit Court of Appeals issued a published opinion,

dated March 13, 2002, reversing the district court's order and the underlying state conviction. Applying a newly announced rule of constitutional law, the Ninth Circuit found a due process violation because a prosecution witness committed perjury without the knowledge of the prosecution. (Appendix A at 6-9.) The Ninth Circuit concluded that because the facts of the perjury were adduced at the federal evidentiary hearing, the state court decision was not entitled to any deference whatsoever under AEDPA. (Appendix A at 5.) In addition, the Ninth Circuit held that this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976) prohibited the prosecutor from challenging Killian's assertion that she cooperated with police during the investigation. (Appendix A at 11-12.)

The Warden filed a petition for rehearing and rehearing en banc which was denied on August 2, 2002. (Appendix B.)

On August 7, 2002, the district court granted Killian's request to be released on bail from prison. On August 12, 2002, the Ninth Circuit issued the mandate to the district court.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT REFUSED TO PERFORM THE THRESHOLD ANALYSIS REQUIRED UNDER TEAGUE V. LANE, 489 U.S. 288 (1989)

After an evidentiary hearing, the district court found prosecution witness Gary Masse gave false testimony at trial, but found that the false testimony was not material. The Ninth Circuit found the testimony materially affected the finding of guilt, resulting in a denial of due process.

At the time Killian's conviction became final on direct review,[4] this Court had found denials of due process in cases involving false trial testimony only where the prosecution knew of the falsity. *See Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935); *United States v. Agurs*, 427 U.S. 97, 103, n.7 (1976); *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959). Indeed, the latest case prior to the finality of conviction stated, "[t]he Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights." *Briscoe v. LaHue*, 460 U.S. 325, 326, n.1 (1983). Notwithstanding these authorities, and the several holdings by lower courts in accord,[5] the Ninth Circuit's finding

---

4. Killian's judgment became final for *Teague* non-retroactivity purposes on January 5, 1988. Killian agreed to this procedural fact in her response to the Warden's petition for rehearing.

5. *See Cruz-Sanchez v. Rivera-Cordero*, 835 F.2d 947, 948 (1st Cir. 1987); *Graham v. Wilson*, 828 F.2d 656, 658 (10th Cir. 1987); *United States v. Petrillo*, 821 F.2d 85, 88 (2nd Cir. 1987); *Wernert v. Arn*, 819 F.2d 613, 617 (6th Cir. 1987); *United States v. Wolf*, 813 F.2d 970, 976-977 (9th Cir. 1987); *United States v. Kaufman*, 803 F.2d 289, 290 (7th Cir. 1986); *United States v. Willis*, 759 F.2d 1486, 1502 (11th Cir. 1985); *United States v. Chagra*, 735 F.2d 870, 874 (5th Cir. 1984); *United States v. Miranne*, 688 F.2d 980 (5th Cir. 1982); *U.S. v. Widgery*, 674 F.2d 710, 712 (8th Cir. 1982); *United States v. Meinster*, 619 F.2d 1041, 1043 (4th Cir. 1980); *United States v. Harris*, 498 F.2d 1164, 1169 (3rd Cir. 1974); *United States v. McCord*, 509 F.2d 334, 349-350 (D.C. Cir. 1974). There appears to be no published decision, from any circuit, finding a constitutional violation based on perjury in the absence of knowledge on the part of the prosecution. The Ninth Circuit decision in this case relied heavily on and cited repeatedly

of a due process violation included the premise that, "[f]or this case, we assume without deciding that the prosecutor neither knew nor should have known of Masse's perjury about his deal." (Appendix A at 6.)

At all relevant stages of the federal habeas proceedings, the Warden asserted that *Teague v. Lane* precluded relief, in that the state of the law in existence at the time of finality of the conviction would not have compelled granting relief in the absence of proof of the prosecution's knowledge of falsity.[6] (See, e.g., Appendix D at 19.) And this Court, even as late as last Term, has found the *Teague* question must be addressed by the federal court as a threshold question once properly raised – without exception. *Horn v. Banks*, 122 S.Ct at 2150 ("we determine that the Court of Appeals committed a clear error by failing to perform a *Teague* analysis"). Nonetheless, the Ninth Circuit refused to address the *Teague* question.

So that the Ninth Circuit may properly grant the Warden the benefit of the *Teague* analysis, the Warden requests that this Court summarily reverse for reconsideration in light of *Horn v. Banks*.

United States v. Young, 17 F.3d 1201, 1204 (9th Cir. 1994). However, *Young* was not in existence in 1988 at the time of finality, and therefore is irrelevant to the *Teague* bar.

6. In *Teague*, this Court held that, outside of two narrow exceptions, a new rule of criminal procedure may not be applied to cases that have become final before the announcement of the rule. *Teague,* 489 U.S. at 310-311.

II.

DOYLE DOES NOT PROHIBIT A PROSECUTOR FROM CHALLENGING A DEFENDANT'S ATTEMPT TO PORTRAY HERSELF AS COOPERATIVE WITH POLICE, AND THEREFORE, THE STATE COURT DECISION DENYING RELIEF WAS NEITHER CONTRARY TO NOR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit expressly found that the state court decision was "contrary to established Supreme Court law." *Killian* conflicts with *Williams v. Taylor*, 529 U.S. 362, 412 (2000), because it fails to apply the standards set by this Court for evaluating state court adjudications. *Killian* also conflicts with *Kibbe v. Dubois*, 269 F.3d 26 (1st Cir. 2001) on the same issue.

The propriety of the grant of habeas relief must be examined under the "contrary to" clause of 28 U.S.C. § 2254(d)(1). The "contrary to" clause is distinct from the "unreasonable application" clause. *Williams*, 529 U.S. at 407. The clause must not be sapped of its meaning, and therefore, a federal court may not issue the writ under the "contrary to" clause "whenever it concludes that the state court's application of clearly established federal law was incorrect. . . ." *Id.* Rather, something more is required. This Court has held that:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are

> materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405-406. Because the facts of this case differ substantially from the facts in *Doyle*, the state court decision was not "contrary to" United States Supreme Court precedent.

A. United States Supreme Court Precedent

In *Doyle*, the defendants were Mirandized at the time of their arrest and invoked their rights, making no statements to police. *Doyle*, 426 U.S at 612-615. This Court found that the constitutionally required *Miranda* warnings carry an implicit assurance that silence will carry no penalty. *Id.* at 617. Therefore, due process would be violated if the invocation of the right to silence was allowed to impeach a defendant's explanation offered for the first time trial. *Id.* This Court's precise holding was clear: "We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619. This Court based its holding on the assumption that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested" *id.*, at 617, and on the unfairness of allowing a defendant to be impeached by his silence after receiving an implicit assurance that he would not be penalized by refusal to talk. *Id.*, at 618.

In a footnote, this Court noted that:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact

> of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619-620, n. 11. Thus, in the very opinion announcing the rule, this Court expressly noted that the rule was not absolute, and was subject to certain exceptions. A close reading of *Doyle* reveals that this Court realized that exceptions were necessary to ensure fairness for the prosecution: "We recognize, of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Id.* at 617, n.7.

In *Anderson v. Charles*, 447 U.S. 404 (1980), this Court revisited *Doyle*. In that case, the defendant gave police a statement after his arrest, then at trial gave testimony inconsistent with his statement. *Id.* at 404-405. On cross-examination, the prosecutor questioned the defendant about the inconsistencies. *Id.* at 405-406. This Court found that *Doyle* did not apply, reasoning that "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408.

During the same term as *Charles*, this Court decided *Jenkins v. Anderson*, 447 U.S. 231 (1980). Although the *Doyle* decision was mentioned only in passing in that case, *Jenkins* clarified that there was no constitutional violation in using a defendant's prearrest silence to impeach an exculpatory story told at trial. *Id.* at 238-240. Two years later, in *Fletcher v. Weir*, 455 U.S. 603 (1982), this Court was confronted with a case where the defendant had been arrested, but was not immediately given his *Miranda* warnings. His post-arrest silence was used by the prosecutor to rebut his exculpatory story at trial. *Id.* at 603-604. After reviewing the holdings of *Doyle*, *Charles*, and *Jenkins*, this Court clarified that there was no

unfairness and no constitutional violation in using post-arrest silence absent the giving of *Miranda* warnings, because without the warnings, there are no assurances by the state that silence will not be used against a defendant. *Id.* at 607.

This Court's decisions have consistently narrowed the rule of *Doyle*. *Charles* clarified that *Doyle* applies to post-arrest silence, not post-arrest statements; *Jenkins* explained that *Doyle* does not apply to pre-arrest silence; *Fletcher* explained that *Miranda* warnings are a prerequisite to a *Doyle* claim.

B. The State Court Decision Was Not "Contrary To" United States Supreme Court Precedent

Under the "contrary to" clause, a state court must either contradict the governing United States Supreme Court rule, or apply it to a set of materially indistinguishable facts and reach a different result. *Williams*, 529 U.S. at 405-406. There is no claim that the state court applied the incorrect rule. Moreover, unlike all of the *Doyle* decisions from this Court, the facts of this case involve a defendant who attempted to portray herself as cooperative during questioning. Thus, this case involves materially distinguishable facts, and therefore is not "contrary to" as that phrase was defined in *Williams*. Having placed before the jury the issue of her cooperation, fairness requires that the prosecution be able to rebut the inference of cooperation with an alternative explanation for her election to stop talking. Such rebuttal evidence does not necessarily create an inference of guilt, any more than the claim of cooperation creates an inference of innocence. However, it does effectively rebut the credibility of the defendant claiming cooperation, because refusing to speak to police, for whatever reason, can hardly be described as cooperation.

The rationale underlying this Court's *Doyle* jurisprudence involves the competing interests in fairness between defendants who have been implicitly assured that their

silence will not be used against them, and prosecutors who need to be able to effectively cross-examine defendants. *Doyle*, 529 U.S. at 617, n. 7. When a defendant who has been assured that her silence will not be used against her turns that shield into a sword by trying to portray herself as cooperative with police, fairness commands that the prosecutor be able to rebut that inference. Since no decisions of this Court have confronted these factual circumstances, and because the logic used in this Court's decisions is consistent with the state court's denial of relief, it cannot be said that the state court decision was "contrary to" clearly established federal law under 28 U.S.C. § 2254(d)(1).

Because the Ninth Circuit decision in this case stated unequivocally that the state court decision was contrary to United States Supreme Court precedent, the case must be reversed as that holding was clearly erroneous.

C. The State Court Decision Was Not An Unreasonable Application Of United States Supreme Court Precedent

Nor can the Ninth Circuit's decision be justified by resort to the second prong of 28 U.S.C. § 2254(d)(1). This Court has described two types of "unreasonable application" cases. The first involves an unreasonable application of the correct rule to particular facts. The second involves the unreasonable extension of a legal principle to a new context, or the unreasonable refusal to extend a legal principle to a new context. *Williams*, 529 U.S. at 407-408. The Warden submits that this case is not "unreasonable" under either formulation.

Because this case involves the unusual situation of a defendant attempting to portray herself as cooperative with police during a murder investigation, the particular facts of this case do not compel the application of *Doyle's* holding. *Doyle* involved defendants who immediately invoked their right to

silence. See *Charles*, 447 U.S. at 408, n.2. Here, by contrast, Killian spoke for several hours in an effort to confuse and hinder the police investigation, and then at trial claimed that she had cooperated. In fact, in *Doyle* itself, this Court suggested in a footnote that this type of cross-examination was permissible. In footnote 11 of *Doyle*, this Court stated that commenting on silence might be permissible to challenge the defendant's trial testimony regarding her post-arrest behavior. 426 U.S. at 620, n.11. In this case, Killian put her post-*Miranda* behavior into question by claiming that she was cooperative. The prosecution was therefore permitted to challenge that portrayal.

It bears noting that a number of the lower federal courts have determined that *Doyle* does not apply to situations where the defendant has suggested that he cooperated with police. *See, e.g.*, *United States v. Reveles*, 190 F.3d 678, 685 (5th Cir. 1999) ("When a defendant attempts to convince a jury that he was of a cooperative spirit, *Doyle* does not tie the hands of prosecutors who attempt to rebut this presentation by pointing to a lack of cooperation."); *Earnest v. Dorsey*, 87 F.3d 1123, 1135 (10th Cir. 1996) ("Thus, reference to post-arrest silence is permissible for rebuttal purposes when a defendant implies that he cooperated with the police."); *United States v. Gant*, 17 F.3d 935, 941-942 (7th Cir. 1994) (same); *United States v. Shue*, 766 F.2d 1122, 1129 (7th Cir. 1985); *Grieco v. Hall*, 641 F.2d 1029 (1st Cir. 1981). Even *McMillan v. Gomez*, 19 F.3d 465 (9th Cir. 1994), relied upon by the district court in this case, and rejected by *Killian*, previously has been interpreted by the Ninth Circuit to stand for the general proposition that there is "no *Doyle* error where prosecution refuted impression that defendant was cooperative by asking about later noncooperation." *United States v. Scholl*, 166 F.3d 964, 976 (9th Cir. 1999).

Given that so many different circuits have determined that *Doyle* has no application under factual circumstances materially indistinguishable from the instant case, it can hardly be said that the state court's denial of relief was an unreasonable

application of United Sates Supreme Court precedent. In fact, one circuit has addressed this precise issue in the context of the AEDPA. In *Kibbe v. Dubois*, 269 F.3d 26, the court addressed the application of *Doyle* and the AEDPA to factual circumstances where the defendant had put before the jury an image of cooperation. Reviewing this Court's evolving *Doyle* jurisprudence, the court concluded that an expansive reading of *Doyle*'s prohibition was unwarranted. *Id.* at 36. Because *Doyle* would have to be expanded to cover the facts of that case, the state court denial of relief was not "contrary to" this Court's precedent. Turning to the "unreasonable application" inquiry, the court noted that it was not enough to merely disagree with the state court; rather, it found that a state court decision is unreasonable under the AEDPA "only if it is `so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.' *O'Brien*, 145 F.3d at 25; *Williams v. Matesanz*, 230 F.3d 421, 425 (1st Cir. 2000)." *Kibbe*, 269 F.3d at 36. The First Circuit noted that although the state court's resolution of the federal legal issue might be in error, it was not so unreasonable as to permit relief under AEDPA. 269 F.3d at 37. The court noted that, based on this Court's prior *Doyle* decisions, a credible argument could be made that *Doyle* only applies where a defendant invokes his right to silence, and has no application is situations where he makes a statement. *Id.* at 38. Alternatively, it might be argued that this Court's decision in *Charles* (permitting cross-examination of inconsistencies between pretrial statement and trial testimony) should be extended to cover situations involving a portrayal of cooperation. *Id.* Given the number of reasonable alternatives based on this Court's precedent, the court concluded that the state court decision was not an unreasonable application of same. *Id.* at 39.

Similarly, in the instant case, the state court's denial of relief was not unreasonable because, as numerous lower federal appellate courts have determined, *Doyle* does not

necessarily apply to the facts of this case. The Ninth Circuit's decision to grant relief on this claim was therefore in direct contravention of 28 U.S.C. § 2254(d)(1) and must be reversed.

III.

THE NINTH CIRCUIT DECISION COMPLETELY IGNORED THE STATE COURT ADJUDICATION IN CONTRAVENTION OF THE AEDPA

As a preface to its analysis of the perjury claim in the decision below, the Ninth Circuit observed that an evidentiary hearing was held in federal court, and that therefore, "AEDPA's standard of review does not apply." (Appendix A at 5.) The Ninth Circuit went on to review the district court's factual determinations for clear error, and reviewed the district court's legal determination de novo. (Appendix A at 5.) The Ninth Circuit gave no deference whatsoever to the state court adjudication.

The relevant law is clear. 28 U.S.C. § 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The words of the statute are mandatory. The writ "shall not be granted" unless one of two conditions are satisfied. Each condition relates to the state court adjudication, not the adjudication of the district court. The Ninth Circuit in this case reviewed the adjudication of the district court, without any reference to the state court adjudication. Thus, the decision clearly bypassed AEDPA.

The fact that the federal district court made factual determinations does not relieve the federal courts from applying AEDPA. The state court adjudication is still evaluated either for its compliance with clearly established United States Supreme Court precedent (28 U.S.C. § 2254(d)(1)), or for reasonableness in light of the evidence presented in state court (28 U.S.C. § 2254(d)(2)). (See Appendix D at 18.) Under the first prong, the state court determination on the perjury claim was neither contrary to nor an unreasonable application of this Court's precedent because, as mentioned in reference to *Teague*, there is no clearly established United States Supreme Court precedent on this issue.

Under the second prong, it must be remembered that all of Killian's claims were presented to the state court, as is required under the rule of exhaustion. *See* 28 U.S.C. § 2254(b)(1); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). (See Appendix D at 12.) Furthermore, under state law, the California Supreme Court reviews habeas corpus petitions by assuming as true all factual allegations in the petition. *People* v. *Duvall*, 9 Cal.4th 464, 474-475, 37 Cal.Rptr.2d 259 (1995); *In re Romero*, 8 Cal.4th 728, 741-742, 35 Cal.Rptr.2d 270 (1994); *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). Thus, the state court adjudication denying relief was based on the assumption that Killian's allegations regarding perjury were true. (Appendix F.)[7] However, *Killian* declared that because

---

7. Presumably, the denial was based on a determination that the perjury was not material, a determination also reached by the district court in this case. (See Appendices D at 29, 41

the state court denied relief without a hearing, the state court "could not have made a proper determination of the merits." (Appendix A at 5.)

No facts came to light in the federal evidentiary hearing that were not alleged in and assumed to be true by the state court.[8] Thus, the state court adjudication still must be evaluated "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). However, the Ninth Circuit misapplied AEDPA by failing to evaluate the state court adjudication at all. Under the Ninth Circuit's reasoning in this case, any time a federal court grants an evidentiary hearing, the state court adjudication would not be entitled to deference. The Warden submits that such an approach is contrary to 28 U.S.C. § 2254(d) and should be rejected by this Court.

---

and E.)

8. Indeed, if new evidence *had* come to light sufficient to place the claim in a significantly different and stronger evidentiary posture, it would then be unexhausted and would have to be returned to state court. *Aiken v. Spalding*, 841 F.2d 881, 883-884 (9th Cir. 1988); cf Appendix D at 18, fn. 5.

CONCLUSION

For the foregoing reasons, the Warden prays the petition for writ of certiorari be granted.

Dated: October 29, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

STAN CROSS
Supervising Deputy Attorney General

PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

PJW:etg
SA2000FA0037

INDEX OF APPENDICES

Killian v. Poole
9th Circuit No. 00-16477
Opinion A

Killian v. Poole
9th Circuit No. 00-16477
Order denying rehearing B

People v. Killian
3 Crim. C001359
Opinion on direct appeal C

People v. Killian
CIV-S-97-2024 GEB GGH P
Findings and Recommendations D

Killian v. Poole
CIV S-97-2024 GEB GGH P
Order adopting Findings and Recommendations E

In re Killian on Habeas Corpus
S057120
Denial of Petition for writ of habeas corpus F

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLORIA KILLIAN,
Petitioner-Appellant,

v.

SUSAN POOLE, Warden,
Respondent-Appellee.

No. 00-16477

D.C. No.
CV-97-02024
GEB-GGH

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
December 3, 2001–San Francisco, California

Filed March 13, 2002

Before: Procter Hug, Jr., Dorothy W. Nelson and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

William J. Genego (argued), Nasatir, Hirsch, Podberesky & Genego, Santa Monica, California, for the petitioner-appellant.

Pat Whalen (argued) and Michael J. Weinberger, Office of the Attorney General of the State of California, Sacramento, California, for the respondent-appellee.

OPINION

HAWKINS, Circuit Judge

We must decide whether the use of perjured testimony, the withholding of evidence that would help show the falsity of the testimony, and the reliance on the perjury by the prosecutor in final argument, alone or in combination justifies habeas relief.

Proceedings Below

In 1986, Petitioner Gloria Killian ("Killian") was convicted in California state court of first degree felony murder, attempted murder, burglary, robbery, grand theft, and conspiracy. While serving life without possibility of parole for his role in the crime, Gary Masse bargained with the prosecution to testify against Killian. Relying upon the testimony of Masse, the jury found that Killian orchestrated the plot to steal valuables from the home of Mr. and Mrs. Ed Davies, a plot which tragically resulted in Mr. Davies's execution-style murder in front of his wife. After unsuccessfully appealing on direct review and in collateral proceedings in state court, Killian filed a habeas petition in district court. A magistrate judge held an evidentiary hearing. He made findings and recommendations, and the district court incorporated those into its decision to deny the petition.

Facts

On December 9, 1981, Stephen DeSantis, disguised as a telephone repair man, entered the suburban Sacramento home of Mr. and Mrs. Davies. After manacling and hog-tying the older couple, DeSantis was joined by his cousin, Gary Masse, who assisted DeSantis in ransacking the house and robbing six suitcases full of silver. During the crime, Ed Davies was shot and murdered; his wife was also shot, but she survived. On

December 14, 1981, an anonymous phone call to authorities identified DeSantis and Masse as the perpetrators. When officers attempted to find Masse, they encountered his wife, Joanne, who told the officers that a woman named Gloria planned the robbery.[1]

Masse surrendered himself to police on December 17, 1981, the same day the police arrested Killian, a former law student with no prior criminal record. After a preliminary hearing, the charges against Killian were dismissed. Masse, on the other hand, was convicted of first degree felony murder in May 1983 and sentenced to life without possibility of parole. Almost immediately after his sentence was imposed, Masse contacted the Sacramento Sheriff's Department to see if any deals could be struck. Assured that the state would be willing to assist in a sentence reduction, he implicated his cousin Stephen DeSantis and Killian. After volunteering his services, Masse's sentence was recalled at the request of the prosecution, and he remained unsentenced for three years.

Killian was re-arrested in June 1983 and named as a defendant, along with Stephen DeSantis, in a seven count information three months later.[2] Killian and DeSantis were

---

1. Gary Masse later testified that he and his wife, Joanne, had, two months prior to the Davies robbery, attempted an armed robbery of Elizabeth Lee's house. Joanne was wearing a wig but the victim of the attempted robbery identified both Gary and Joanne. (The robbery attempt was foiled because Ms. Lee had a gun, which scared off the Masses.)

2. Stephen's brother, Robert, was also charged for his lesser role in the Davies robbery, but he agreed to a plea in exchange for testimony at Stephen's trial. He did not testify at Killian's trial. Although testimony from DeSantis' trial was not introduced at Killian's trial, it was introduced in the habeas hearing before the district court.

tried separately. Stephen DeSantis went first, took the stand in his own defense and testified that Killian was not involved in the crime in any way and that he had never even met or heard of Killian. He further testified that Masse had told him about a prior aborted attempt to rob the Davies family in which Gary's wife, Joanne, went to the front door of their home and asked to use their phone. This was important because the conspiracy charge against Killian included the alleged overt act that Killian went to the door of the Davies's residence in an unsuccessful attempt to gain entry for Masse and DeSantis sometime before the actual robbery on December 9, 1981.[3]

Masse testified at Killian's trial in 1986. The key elements of Masse's testimony were: (1) he had no deal or arrangement with the prosecution; (2) Killian was the "mastermind" of the plot to rob the Davies; (3) Killian accompanied Masse on the earlier attempt at the Davies's home; and (4) Killian called Masse after learning of the robbery and murder to demand her share of the robbery proceeds. The prosecution's only direct evidence was Masse's testimony; without it, there was no case, as evidenced by the initial investigation into Killian's involvement, which yielded charges that were then dismissed. Masse was, as the court below noted, the "make-or-break witness." Killian was convicted and sentenced to thirty-two years to life in prison.

Standard and Scope of Review

The district court's decision to deny a habeas petition is reviewed de novo. See *Alvarado v. Hill, 252 F.3d 1066, 1068 (9th Cir. 2001).* We review the court's factual findings for clear error. *Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999).* We

---

3. Mrs. Davies testified at Killian's trial, describing the pre-robbery appearance of a woman at her door. She could not identify Killian as that person.

ordinarily presume the state court's factual determinations to be correct. *28 U.S.C. § 2254*(e)(1).

Because this habeas petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), that statute's standard of review applies generally to matters adjudicated on the merits in state court. AEDPA requires federal courts to deny habeas relief unless the state court ruling resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or, resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *28 U.S.C. § 2254*(d).

For claims for which no adjudication on the merits in state court was possible, however, AEDPA's standard of review does not apply. Hence AEDPA deference does not apply to Killian's perjury claim in this case because the state courts could not have made a proper determination on the merits. Evidence of the perjury, after all, was adduced only at the hearing before the magistrate judge. Having refused Killian an evidentiary hearing on the matter, the state cannot argue now that the normal AEDPA deference is owed the factual determinations of the California courts. See *Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir. 1999)* (less deference accorded where the state court fails to make finding of fact); cf. *Michael Williams v. Taylor, 529 U.S. 420, 444, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000)* (state court denial of evidentiary hearing establishes cognizable cause for procedural default in not presenting claims to the state court). Therefore, we review the district court's factual determination on the perjury claim for clear error and the district court's legal determination that the perjury did not violate Killian's constitutional rights de novo.

I. The Perjury of the Prosecution's Main Witness

[1] The knowing use of perjured testimony by a prosecutor generally requires that the conviction be set aside. See *United States v. Agurs, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)* (conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury). For this case, we assume without deciding that the prosecutor neither knew nor should have known of Masse's perjury about his deal.[4] Thus our analysis of the perjury presented at Killian's trial must determine whether "there is a reasonable probability that [without all the perjury] the result of the proceeding would have been different." *United States v. Young, 17 F.3d 1201, 1204 (9th Cir. 1994)* (citing *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)).*

Following the evidentiary hearing held before the magistrate judge, one cannot reasonably deny that Gary Masse gave perjured testimony at Killian's trial. Perhaps most importantly, Masse conceded that he lied at Killian's trial about not having a verbal agreement of leniency in resentencing in exchange for testifying against Killian.[5] In addition to Masse's recanting, other evidence confirms the existence of some agreement. For instance, never disclosed to Killian was a sealed letter by the prosecutor to Masse's sentencing judge, which stated that Masse's "cooperation, in my judgment, deserves consideration by the Court ... [and to] that end, the People plan

---

4. The evidence indicating that the prosecution should have known about Masse's perjury about his alleged deal is significant, but it is a matter that is contested by the government. Resolution of this factual dispute is unnecessary to our holding, so we abstain from ruling on it.

5. At trial, Masse testified that" there weren't no bargains made" in return for his testimony.

not to object to a renewed Williams Motion to strike the special circumstances."

Masse's perjuries reached further than the mere motivation to testify at Killian's trial. They go to the very heart of whether and to what extent Killian was involved. Masse admitted at the evidentiary hearing he lied when he described Killian at trial as the "master planner" of the robbery. He admitted he perjured himself when he told the jury that Killian called him after the robbery to demand "her share" of the robbery's proceeds.[6] Masse's disregard for the truth is best revealed by a letter he wrote to the prosecutor shortly after Killian's trial in which he emphasized that he "lied [his] ass off on the stand" for the government.

[2] The district court analyzed each of the perjurious statements separately. It found the level of prejudice suffered as a result of each individual statement insufficient to conclude that a reasonable juror would have had doubt about his or her verdict. The main reason offered for this conclusion is that Killian's conviction was not based on any "material" perjured testimony. According to the district court, the perjuries were

---

6. The magistrate judge acknowledged the perjury regarding the "especially ... outright falsehood about petitioner still sharing in the proceeds." However, the magistrate judge overlooked the significance of this perjury. Indeed, shortly thereafter, the judge stated that Killian "continued to believe herself part of the conspiracy and entitled to part of the robbery proceeds." But the only basis for thinking Killian believed herself to be "entitled to part of the robbery proceeds" is the testimony of Masse, whom the judge just concluded perjured himself on that very point. Further, the "corroborating" statement found by the magistrate was Killian's comment, after hearing a TV report about the robbery-murder," Oh, my God, look at that." But this statement does nothing in the way of advancing the claim that Killian viewed herself as entitled to the proceeds of the robbery, or, for that matter, had anything to do with it.

irrelevant because none "clearly" touched on Killian's involvement in prior discussions with Masse. And because conspiracy is "in for a penny, in for a pound, "the district court thought the conviction should stand, since Masse never recanted on Killian's purported initial involvement.

The district court cited no authority to justify applying the materiality standard so narrowly, but our task is to consider all of Masse's lies, not just those about which the prosecution may have known. Under the Young standard, we must determine whether there is a reasonable probability that without all the perjury the result of the proceeding would have been different. In this case, the finders of fact were deprived of the fundamental inference that if Masse lied about X, Y and Z, it is quite likely that he lied about Q, R and S. Moreover, Masse's testimony was virtually the whole case for the government. Given his motivation and penchant for lying, it is unreasonable to accept at face value the assurances Masse gave at the federal evidentiary hearing; indeed doing so surely deprives Killian of her right to a trial by jury, and compounds the constitutional error. See *Sullivan v. Louisiana, 508 U.S. 275, 279, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993).*

In short, Masse's testimony was the product of someone with incentives to lie for himself and his wife's sake. He admitted "lying his ass off" at the trial to procure leniency at resentencing later. He admitted that telling the truth would have taken Killian out of participating in the crime. He admitted that "I couldn't tell the truth because there would have been no more deals. I wouldn't have come through for them." He admitted he even perjured himself when he told the jury he was being truthful and wanted to set the record straight. The prosecution, for its part, took advantage of Masse's perjury regarding his deal, arguing at closing that:" we have nothing to do with how much time Gary Masse serves."

[3] While the prosecution may well have known that Masse lied about the existence of a deal, such a belief is not necessary to our holding here. Under the Young standard, we must look to the cumulative effect of Masse's lies. "[A] government's assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. " *Young, 17 F.3d at 1203-04.* Because Masse perjured himself several times and because he was the "make-or-break witness" for the state, there is a reasonable probability that, without all the perjury, the result of the proceeding would have been different. See id. In sum, it cannot be said "with fair assurance, ... that the judgment was not substantially swayed by the error." *O'Neal v. McAninch, 513 U.S. 432, 437-38, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995).*[7]

II. Failure to Disclose Impeachment Evidence

[4] If exculpatory or impeachment evidence is not disclosed by the prosecution and prejudice ensues, a defendant is deprived of due process. *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972); United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).* Prejudice is determined by looking at the cumulative effect of the withheld evidence and asking "whether

---

7. Our skepticism toward the reliability of the verdict is bolstered by the sworn prior testimony of Stephen DeSantis. Having no apparent motive to do so, DeSantis exonerated Killian of any participation in the robbery murder. Although this testimony never came into Killian's trial, it was before the district court in the only evidentiary hearing which considered the impact of the post-trial discoveries discussed herein.

the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. " *Strickler v. Greene, 527 U.S. 263, 290, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)* (citations and internal quotation marks omitted).

[5] Three undisclosed letters are signally important here. First is a letter from May 13, 1984, in which Masse expressed concern for the safety of his wife, Joanne. Killian explains this would have been useful to show Masse inculpated Killian to keep Joanne Masse out of prison, a relevant point since, according to Stephen DeSantis, it was Joanne who participated in the first attempted robbery of the Davies's residence. A second letter by Masse, dated April 21, 1986, written after Killian's trial, is a reflection of Masse's state of mind during his testimony. This letter states flatly: "I gave you De Santis and Killian. ... I even lied my ass off on the stand for you people."

[6] The third and perhaps most important letter was, as noted earlier, the prosecution's sealed letter of April 1985, in which the government stated its intention to support Masse's resentencing as a result of his cooperation. Although it might not have been disclosed to Masse, and therefore not sufficient to constitute a plea bargain, the letter would still have been valuable to the defense in impeaching Masse's credibility before the jury. The undisclosed material, considered collectively, exposed Masse's motivation to lie and tended to show that he did lie.

The government responds that none of the undisclosed evidence relates to the core facts establishing Killian's guilt, or establishes that Masse was impeachable beyond what was accomplished at trial. But the only way Masse's later admission that he "lied [his] ass off" does not cast doubt upon his earlier testimony is if one believes the witness was thoroughly

discredited to begin with.[8/] If the "make-or-break" Masse was thoroughly discredited, then the evidence was plainly insufficient to convict Killian. Alternatively, if one looks at the "core facts establishing Killian's guilt," the chief evidence of those "core facts" derives, again, from the now thoroughly discredited Gary Masse.

[7] Consequently, we view the determination by the state courts and the district court that there was insufficient prejudice to be firmly wrong and an unreasonable application of the law to the facts.

III. Prosecutorial Commentary on Privileged Conduct

[8] Killian was questioned about the crime on December 16, 1981. She spoke the police for two hours. After speaking to them, Killian was arrested. After being told she had a right to remain silent, she invoked that right. During cross-examination and at closing argument, the prosecution contended --no less than eight separate times --that Killian had something to hide by becoming silent upon arrest. Killian claims that the state court's decision flouts *Doyle v. Ohio, 426 U.S. 610, 611, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976),* and thereby warrants reversal of the district court's decision to deny habeas relief.

> Since a defendant who is given [a Miranda] warning is implicitly being told that no penalty will be imposed against him for choosing to exercise the right to remain silent, the Fourteenth Amendment Due Process Clause has thus been interpreted to prohibit the use of a defendant's post-warning silence for impeachment purposes.

---

8. We recognize that because of the timing of Masse's admission about his prior untruthfulness, it would only have been useful to Killian on direct or collateral appeals.

United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) (citing *Doyle v. Ohio, 426 U.S. 610, 618-19, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976))*; see also *United States v. Bushyhead, 270 F.3d 905 (9th Cir. 2001).*

The district court relied on *McMillan v. Gomez, 19 F.3d 465 (9th Cir. 1994),* which clarified the dimensions of Doyle, permitting the prosecution to refute the impression of cooperativeness by asking about later non-cooperativeness. But the McMillan circumstances are not present here. In McMillan, the defendant waived his Miranda rights upon his arrest by agreeing to talk, whereas Killian cooperated for two hours, and, only upon arrest, invoked the very rights Miranda promises.

[9] In light of rulings protecting privileged conduct in cases such as *Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965)* (commenting on defendant's refusal to testify) and *United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir. 1978)* (commenting on defendant's refusal to consent to search), we apply Doyle for the proposition that if a person is told she can exercise her right to be silent whenever she wants without penalty, she should not be badgered by a prosecutor eight times, as she was here, about whether she has "something to hide" by exercising that right. McMillan says the prosecution can rebut a defendant's attempt to paint herself as cooperative after a defendant has been arrested and has waived her Miranda rights, but it says nothing about hectoring a defendant where cooperation was asserted only before her arrest. The core of Doyle is to protect a privilege. McMillan's facts fall outside the zone of Doyle, whereas Killian's silence is squarely within it. The determination of this issue by the state and district courts was contrary to established Supreme Court law.

IV. Cumulative Error

[10] Even if the failure to disclose impeachment evidence, Masse's perjury, and the prosecutor's comments on privileged conduct were not each sufficient to justify habeas relief, we note that if ever there were a case for application of cumulative error principles, this is it. The collective presence of these errors is devastating to one's confidence in the reliability of this verdict and therefore requires, at the very least, a new trial. For even if no single error were prejudicial, where there are several substantial errors, "their cumulative effect may nevertheless be so prejudicial as to require reversal." *United States v. De Cruz, 82 F.3d 856, 868 (9th Cir. 1996);* see also *Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992).*

Conclusion

The district court's denial of Killian's habeas petition is reversed, and we remand to the district court with instructions to grant the writ unless the state grants Killian a new trial within a reasonable time.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

AUG 02 2002

Cathy A. Catterson, Clerk
U.S. Court of Appeals

GLORIA KILLIAN,

Petitioner-Appellant,

v.

SUSAN POOLE, Warden,

Respondent-Appellee.

No. 00-16477

D.C. No. CV-97-01014-GEB GGH
Eastern District of California, Sacramento

ORDER

Before: HUG, D. W. NELSON and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Hug and D. W. Nelson have recommended denying the petition for rehearing en banc and Judge Hawkins has voted to deny the en banc petition.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX C

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE)	3 Crim. C001359
)	(Super.Ct.No. 66894)
Plaintiff and Respondent,)	
)	FILED
v.)	Aug 28 1987
)	COURT OF APPEAL - 3RD DISTRICT
GLORIA MARIE KILLIAN,)	WILFRIED J. KRAMER, Clerk
)	By _____, Deputy
Defendant and Appellant)	

In this case of a brutal, execution-style killing of Edward Davies and the attempted killing of Grace Davies, wife of Edward, the plan for the underlying robbery of the Davies, an elderly couple, was conceived by defendant herein Gloria Killian. She then recruited Gary Masse to carry out the scheme. Without notifying defendant of the exact time the crime was to be perpetrated, Gary Masse and his cousin, Stephen DeSantis, robbed the couple at gunpoint in their Rosemont home. During the robbery, Stephen DeSantis shot both victims in the head, causing the death of Mr. Davies. Mrs. Davies survived but suffered partial paralysis of the face. After a separate trial in which Gary Masse testified against defendant, she was convicted of first degree felony murder (Pen. Code, § 187, subd.

(a))[1], attempted murder of Mrs. Davies (§§ 664, 187, subd. (a)), burglary (§ 459), two counts of robbery (§ 211), grand theft of the Davies's car (§ 487, subd. 3), and conspiracy (§ 182). Defendant was sentenced to state prison for seven years for attempted murder and for a consecutive term of 25 years to life for the murder conviction. Sentences on the remaining counts were imposed concurrently to the term for attempted murder.

On appeal, defendant contends (1) the total sentence of 32 years to life constitutes cruel and unusual punishment as it is disproportionate to her culpability; (2) the court erred in admitting the testimony of Gary Masse who, although convicted of similar charges in another trial, remained unsentenced at the time he testified against defendant, and (3) the court erred in admitting photographs taken in a warrantless search of the victims' residence. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In fall 1981, defendant Gloria Killian, who had recently dropped out of McGeorge Law School after completing most of her third year, resided with her boyfriend Rick Hewitt at the home of Virgil Fletcher, a coin dealer. Defendant learned from Fletcher, a part owner of Allied Coin Company, that Edward Davies, the victim, had recently purchased silver coins valued at $27,000 from Fletcher and his partner, Charlie Duncan. Defendant began to question Fletcher about Mr. Davies's habits. She asked Fletcher whether Mr. Davies dated younger women and where Mr. Davies lived and shopped. Defendant then contacted a friend, Neva Snyder, asking that Snyder introduce her to someone who might be interested in committing a residential burglary for a share of the crime proceeds. Snyder introduced defendant to Gary Masse. Defendant informed him she and "her people" wanted him to do

---

1. All statutory references are to the Penal Code unless otherwise provided.

a "job," describing the Davies's robbery and promising more lucrative "jobs" would follow if Masse successfully robbed them and split the proceeds with her.

A few days later, defendant showed Masse the Davies's home at 8925 Rosewood Drive. She explained the Davies owned a silverware set valued at $8,000 and that Mr. Davies would divulge the location of his extensive coin collection if Masse threatened Mrs. Davies in his presence.

During the following weeks, defendant pressured Masse to commit the robbery. Masse enlisted the help of his cousin, Stephen DeSantis. Defendant initially voiced opposition to DeSantis's involvement in the plan, but finally agreed to allow him to participate. The three discussed the robbery on several occasions.

On December 9, 1981, DeSantis called Masse and arranged to meet him on a street near the Davies home. DeSantis's brother Robert drove DeSantis to the designated meeting place. DeSantis had acquired telephone repair equipment and a telephone truck in preparation for the crime. DeSantis and Masse, armed with guns, drove by the Davies's home in the telephone truck, planning to gain entry into the house by posing as repairmen. The plan was foiled as Mr. Davies was not at home. They then drove to Robert DeSantis's house and Masse discarded his gun and silencer as he felt the weapon was "too bulky and big." When they returned to the Davies's house, Mr. Davies was home.

DeSantis, dressed as a repairman and armed with a revolver, rang the doorbell while Masse sat in the truck. After Mrs. Davies allowed DeSantis to enter the house, he pointed the revolver at the couple, ordered them to lie down on the kitchen floor, hogtied and handcuffed them, and threw a bedspread over their heads. When Masse entered the house a short time later, DeSantis was interrogating Mr. Davies, holding a knife to Mrs. Davies's throat and threatening to cut her throat unless Mr. Davies revealed where his silver and gold was hidden. Mr. Davies insisted his money was kept in a safe at Allied Coin

Company. The men ransacked the house and garage, stuffing six suitcases with silver coins taken from safes which were pried open. They also took a valuable silverware set from the dining room. While Masse was loading the suitcases into the Davies's car, a Peugeot, DeSantis shot Mr. Davies in the head. When Masse returned to the house he observed DeSantis shoot Mrs. Davies in the right temple.

Masse and DeSantis then drove to the home of Robert DeSantis in the Davies's car. After unloading the suitcases into the back of Stephen DeSantis's van, Masse drove the Peugeot to a parking lot and abandoned it. Masse and DeSantis then returned to the Davies's home. While Masse waited in the car, DeSantis reentered the house to remove the handcuffs from the couple. DeSantis then shot Mr. Davies in the head a second time. Believing both victims were dead, the men drove the telephone truck out of the area and abandoned it. The two then separated. Stephen and Robert DeSantis later returned to the Davies's house a third time so that Stephen could pick up the large chest which had held the silverware set. Defendant was not present at the robbery nor was she informed that it would take place on December 9.

Mr. Davies died as a result of his injuries. Mrs. Davies crawled to the telephone but discovered the line had been severed. She waited until morning and crawled to the sidewalk where she was discovered by a passerby.

When the police arrived, Mrs. Davies informed them her husband was dead inside the house. The responding officer entered the house to check for suspects and to examine the deceased victim. Police personnel reentered the house several times during the next two days while conducting their investigation. Mr. Marks, a relative of Mrs. Davies, accompanied the police into the house several times during the investigation.

On December 10, 1981, Masse received a call from defendant requesting he meet her at Neva Snyder's house. Upon meeting defendant, she informed Masse she had heard about the

robbery and murder on the television news and she demanded her share of the coins. Fearing he would be implicated in the murder, Masse denied he was involved in the robbery and refused to disclose DeSantis's last name to defendant.

On December 14, 1981, police received an anonymous phone call identifying DeSantis and Masse as the perpetrators of the crime. After police attempted to locate Masse, his wife, Joanne Masse, told the officers defendant had planned the robbery. Masse surrendered himself to police on December 17, 1981. Defendant was arrested the same day but the charges were dismissed in May 1982.

In May 1983, Masse was convicted of first degree felony murder and sentenced to life without possibility of parole. After judgment was imposed he contacted the Sacramento Sheriff's Department and implicated defendant as the initiator of the robbery, In attempting to elicit background information about Stephen DeSantis, police officers questioned Masse about other crimes, promising that he and his wife would not be prosecuted for any other crimes to which he alluded. After Masse cooperated and tape recorded a statement implicating defendant, the district attorney wrote a letter to the judge requesting that he recall Masse's life sentence and reconsider a more lenient sentence. The sentence was recalled and Masse remained unsentenced at the time defendant was rearrested.

In September 1983, defendant and Robert and Stephen DeSantis were charged with first degree felony murder (count I -- § 187, subd. (a)), attempted murder (count II -- §§ 664, 187, subd. (a)), burglary (count III -- § 459), two counts of robbery (counts IV and V -- § 211), grand theft of the car (count VI -- § 487.3) and conspiracy (count VII -- § 182). The information alleged three overt acts were committed in furtherance of the conspiracy: (1) that Stephen DeSantis entered the Davies's residence on December 9, 1981; (2) that defendant went to the Davies's door sometime prior to the actual robbery in an unsuccessful attempt to gain entry into the home for

Masse and DeSantis, and (3) that Robert DeSantis drove Stephen DeSantis to meet Masse in the Rosemont area on December 9.

Prior to her trial, defendant moved to continue any testimony from Masse until after he was sentenced. The motion was denied. Defendant also joined in Stephen DeSantis's motion to suppress evidence of photographs taken of the crime scene during the three-day investigation conducted by police. This motion was also denied. Defendant's motion for a separate trial was granted.[2/]

Masse was the key prosecution witness in defendant's trial. He testified that defendant conceived the plan to rob the Davies and that she recruited him to carry out the crime. He claimed she had participated in an unsuccessful attempt to rob the Davies on a prior occasion in which defendant rang the doorbell at the Davies's house, feigned car trouble and requested use of the Davies's phone in hopes of gaining entry for Masse and DeSantis. At that time Mrs. Davies, however, refused to permit defendant to enter the house. Masse also stated defendant arranged to receive one-half of the stolen property. He acknowledged that he and DeSantis robbed and shot the victims without defendant's specific knowledge as to the time but that defendant demanded her one-half share of the stolen property after learning the robbery and murder had occurred.

Mrs. Davies testified that several weeks prior to the robbery a woman had knocked on the door asking to use the phone but she had denied the woman entry into the house. Mrs. Davies stated the woman had a similar appearance to defendant but was unable to identify defendant as the culprit. She explained that the head wounds she suffered caused her to

---

2. Robert DeSantis pled guilty as an accessory to the crime under section 32 and was granted three years formal probation on condition he serve eight months in county jail. Stephen DeSantis was sentenced to death after a jury convicted him on all seven charges.

become partially paralyzed in her face and that she was totally deaf on the right side.

Virgil Fletcher testified defendant had asked him numerous questions about the Davies prior to the robbery and that she jumped up, stating "`Oh my God, look at that'" after learning of the murder from the television news.

Evidence of defendant's planning activities consisting of several pages from an automobile trip and maintenance ledger seized from her at the time of her arrest were admitted. On one page defendant had written "`screen door latched,'" "`where garage,'" "`she always waiting in window,'" and "`don't approach at coin shop.'" On a second page defendant had written a description matching that of the Davies, followed by the words "gloves, tape, rope and scanner." A third page listed the address "8933 Rosewood," two doors down from the Davies's residence, and the address had been scratched out in pen.

Defendant testified in her own behalf, denying any knowledge of or involvement in the planning of the robbery. She claimed she had worked as a process server during 1980 and intimated the Rosewood address listed in her car ledger was probably an address she visited to serve a subpoena.

Defendant was found guilty of all seven counts. The jurors found true the two overt acts involving Stephen and Robert DeSantis but they were unable to agree whether defendant actually participated in a prior unsuccessful attempt to rob the Davies.

Defendant was sentenced to state prison for seven years for count II (attempted murder -- §§ 664, 187, subd. (a)), to a consecutive term of 25 years to life on count I (murder -- § 187, subd. (a)) and to concurrent middle terms on each of the remaining charges (counts III-VII). This appeal followed.

I

Citing People v. Dillon (1983) 34 Cal.3d 441, defendant contends the imposition of a sentence of 32 years to life constitutes cruel and unusual punishment in violation of article I, section 17 of the California Constitution as the sentence is grossly disproportionate to her culpability. She urges the following factors militate against such a harsh application of the felony-murder rule: (1) she has no prior criminal record; (2) she did not actively participate in the robbery, murder or attempted murder and (3) she was not aware the crimes would be committed or that Masse and DeSantis would be armed. Defendant contends the court failed to consider her level of culpability as required by Dillon and urges this court to reduce her sentence. We disagree.

In Dillon, the California Supreme Court held the penalty for first degree felony murder is subject to the prohibition against cruel and unusual punishments and that a particular punishment is impermissible if grossly disproportionate to the offense or the culpability of the offender. Dillon was a 17-year-old student who unsuccessfully attempted to rob and, in the process, fatally shot a rural marijuana grower who was guarding his crop. The jury convicted Dillon of first degree murder based on its finding that the killing had occurred during the course of an attempted robbery. As was clear from their communications with the trial court during and after deliberations, the jurors had serious reservations about applying the felony-murder rule but nevertheless imposed a sentence of life imprisonment. (Id., at pp. 483-485.) On review, the Supreme Court held it was compelled by statute to uphold application of the felony-murder rule but the life sentence imposed violated the cruel and unusual punishment clause of the California Constitution. The court reduced the conviction to second degree murder (id., at pp. 485-489) stating as reasons: (1) the jury was reluctant to apply the felony-murder rule; (2) defendant was an unusually immature youth who did not

foresee the risk he was creating; (3) defendant had no prior trouble with the law and (4) only petty chastisements were handed out to the six other youths who participated with defendant in the same offenses. (Id., at pp. 487-488.)

In reviewing assertions that a particular sentence amounts to cruel or unusual punishment under the California Constitution, the reviewing court must determine whether the penalty "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (Id., at p . 478, quoting In re Lynch (1972) 8 Cal.3d 410, 424.) The test takes into account the nature of the offense, in concrete and abstract terms, and the nature of the offender. (People v. Leigh (1985) 168 Cal.App.3d 217, 222.) The nature of the offense includes "such factors as motive, the way it was committed, the extent of the defendant's involvement, and the consequences of [her] acts." (Dillon, supra, 34 Cal.3d at p. 479,) The nature of the offender focuses on "the defendant's individual culpability as shown by such factors as . . . age, prior criminality, personal characteristics, and state of mind." (Ibid.)

Defendant herein contends an analysis of the record mandates a finding of cruel and unusual punishment. This contention is utterly devoid of merit. First, the nature of the offense in the abstract (i.e., robbery-murder) "presents a very high level of . . . danger, second only to deliberate and premeditated murder with malice aforethought." (Dillon, supra, 34 Cal.3d at p. 479.) Second, the concrete terms of this offense were particularly dangerous. Defendant orchestrated a scheme to rob an elderly couple in their own home. In her quest for unearned riches, she advocated threat of bodily harm to Mrs. Davies as a means of forcing Mr. Davies to disclose the location of his silver. She must have anticipated the robbers would be armed with a weapon of some kind to carry out this threat. Moreover, the consequences of the plan were particularly grave. Mr. Davies died as a result of gunshot wounds and

Mrs. Davies suffered facial paralysis and deafness in her right ear.

Third, the nature of defendant bears no semblance to the impetuous adolescent in Dillon.[3/] Defendant was 35 years old at the time of the robbery. She had completed three years of legal study and undoubtedly understood her own culpability in planning the crime. She knew there were risks but she went ahead with the crime, pressuring Masse to complete the job. Moreover, after learning of the murder, she apparently was so unmoved by the brutality of the killing and so unrepentant of having been the genesis of the plot that she continued to demand her share of the spoils. We cannot conclude the sentence is so disproportionate that it "shocks the conscience and offends fundamental notions of human dignity." (Lynch, supra, 8 Cal.3d at p . 424.) There is no constitutional infirmity.

---

3. We note also Dillon's application of a proportionality analysis to reduce a first degree felony murder conviction represents an exception rather than a general rule. (See People v. Munoz (1984) 157 Cal.App.3d 999, 1014.) A review of numerous post-Dillon decisions has failed to uncover a single case in which an appellate court has applied Dillon to reduce a first degree murder sentence. (But see People v. Leigh, supra, 168 Cal.App.3d at p. 224 (suggesting that on remand, the trial court could effect such a reduction).) These include at least five cases in which the defendant was not the actual killer and apparently did not intend that the victim be killed. (See People v. Kelly (1986) 183 Cal.App.3d 1235; People v. Rose (1986) 182 Cal.App.3d 813; People v. Williams (1986) 180 Cal.App.3d 922; People v. Almaraz (1985) 173 Cal.App.3d 304; People v. Laboa (1984) 158 Cal.App.3d 115.) These later cases seem to suggest that even though the causational nexus between a defendant's personal involvement in a criminal enterprise and a resultant killing is minimal or nonexistant, something more is required in terms of the second and third Dillon factors in order to justify a reduction in sentence.

II

Defendant next contends the court reversibly erred in allowing Masse to testify against her while he remained unsentenced. Citing People v. Medina (1974) 41 Cal.App.3d 438, she asserts Masse's testimony is impermissibly tainted as his expectations of receiving a more lenient sentence induced him to implicate her in the crime. We disagree.

In Medina, in a prosecution of two defendants for murder, three witnesses testified under a grant of immunity "'subject to the conditions that the witness not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers . . . .'" (Id., at p. 450.) The testimony of these witnesses was the sole evidence which implicated defendants in the crime. In reversing the defendants' murder convictions, the court held that when the terms of the immunity place the witness "under a strong compulsion to testify in any particular fashion," the testimony is tainted and inadmissible. (Id., at p . 455.)

We perceive the Medina rule is inapplicable in the instant case as the record is devoid of any evidence that Masse was compelled to testify in any particular fashion. A grant of immunity may be conditioned on a requirement that a witness testify fully and fairly to the facts. (Ibid; People v. Dixon (1979) 24 Cal.3d 43, 53.) Here, Masse contacted the sheriff's department after his conviction and indicated a willingness to reveal the details of planning the robbery. Although officers questioning Masse intimated that he and his wife would not be prosecuted for other crimes to which Masse alluded, they did not promise a more lenient sentence or demand that he testify in any particular fashion. Rather, Masse indicated he understood the judge sentencing him would consider his cooperation in determining the length of sentence, but denied any explicit agreement promising a more lenient sentence in exchange for his testimony. More importantly, Masse understood he was expected to state the truth and that a conviction of defendant

was irrelevant to favorable consideration at the time of his own sentencing.

Unlike the situation in Medina, in this case there was other evidence linking defendant to the planning of the crime. Officer Reed, one of the investigating officers, testified that Masse's wife informed him of defendant's involvement prior to Masse's arrest. Virgil Fletcher corroborated the charges by testifying that defendant continued to question him about Mr. Davies's wealth. The pages from defendant's automobile ledger strongly suggest she was involved in planning the crime. Defendant was not deprived of her right to a fair trial.

III

Defendant finally contends the trial court erred in admitting evidence consisting of photographs taken in the victims' residence during a warrantless search. Prior to trial, defendant joined in Stephen DeSantis's section 1538.5 motion to suppress evidence seized from the Davies's home and car in a warrantless search which continued for several days after the crime.[4] The motion was denied. On appeal, defendant contends the trial court erred in denying the motion as it erroneously relied on an "implied consent" theory delineated in People v. Hackett (1981) 115 Cal.App.3d 592. We disagree.

Defendant's reliance on the "vicarious exclusionary" rule in effect at the time of her crime is misplaced. Under that rule, peculiar to California prior to the passage of Proposition 8, a criminal defendant could object to the introduction of

---

4. The clerk's transcript does not contain a copy of Stephen DeSantis' motion to suppress evidence. However, the record indicates defendant joined in the motion and that defendant and DeSantis contested the admissibility of evidence seized from the residence during December 10, 1983, through December 13, 1983, including photographs taken of the crime scene on those days.

evidence illegally seized from a third person. (Kaplan v. Superior Court (1971) 6 Cal.3d 150.)[5] However, when the third person's right of privacy is not violated, but instead protected, there is no illegal seizure of which a defendant may vicariously complain. (People v. Solario (1977) 19 Cal.3d 760, 764; People v. Newell (1979) 93 Cal.App.3d 29, 37.) In this case, police officers initially entered the Davies's residence to investigate after Mrs. Davies told them her husband was dead inside the house, The record indicates that police continued to investigate the scene for the next few days without a warrant while Mrs. Davies was in the hospital in serious condition. Mr. Marks, a close relative, accompanied officers to the house on several occasions. At the hearing on the motion to suppress evidence, the People presented testimony that neither Mrs. Davies nor Mr. Marks objected to the continuing investigation at the Davies's house. The trial court concluded the search was conducted pursuant to consent by the victim. In denying the motion to suppress, it "adopted . . . the analysis and the authority set forth in the [People's memorandum to opposition to the section 1538.5 motion]." Although the prosecutor urged in its memorandum that the warrantless search of the Davies's stolen Peugeot was valid under the "implied consent" theory set out in Hackett, supra, 115 Cal.App.3d 592, in oral argument, he contended there was actual consent to search the residence, and that Mrs. Davies's report that her husband was inside the house dead was tantamount to a consent, if not a direction to enter the residence. Moreover, Mr. Marks ratified her consent during the ensuing investigation within the house. Consent to search is a factual question and the trial court's determination will not be

---

5. The provisions of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)) abrogated the "vicarious exclusionary rule." (In re Lance W. (1985) 37 Cal.3d 873.) However, Proposition 8 applies only to prosecutions for crimes committed on or after its June 9, 1982 effective date (People v. Smith (1983) 34 Cal.3d 251, 258), and is not applicable to the instant case.

disturbed on appeal absent a clear abuse of discretion. (People v. Martino (1985) 166 Cal.App.3d 777.) Reviewing the circumstances of this case, we perceive there was no illegal seizure of which defendant may complain as the police investigating the crime scene did so at both the explicit and implicit request of Mrs. Davies.[6/] There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

s/CARR, J.

We concur:

s/BLEASE, Acting P.J.

s/SPARKS, J.

---

6. Defendant claims she was unduly prejudiced by the admission into evidence of a photograph of Mr. Davies's body lying on the kitchen floor near a bloody pillow. The People correctly point out that defendant did not object to this evidence at trial. It appears the trial judge admitted this photograph into evidence while reserving a ruling on Exhibit 5A, which depicted the kitchen area without the body. Later in the trial, however, the judge attempted to exclude the photograph of the body as unduly prejudicial, apparently after confusing the exhibit numbers. We have viewed the photographs and they are singularly noninflammatory.

APPENDIX D

FILED

FEB 28 2000

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

By_____

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN,

Petitioner, No. CIV-S-97-2024 GEB GGH P

vs.

SUSAN POOLE,

Respondent. FINDINGS AND RECOMMENDATIONS

_____/

Introduction and Summary

It is not often in habeas corpus that this court reviews colorable assertions of actual innocence allied with claims of constitutional error. This is such a case, and the court has very carefully scrutinized all facts within its purview.

Petitioner challenges her 1986 conviction for first degree felony murder, attempted murder, burglary, robbery (two counts), grand theft, and conspiracy. Petitioner was sentenced to a total of thirty-two years to life, consisting of seven years for the attempted murder conviction, a consecutive 25 years to life for the murder conviction, and the remaining sentences concurrent with the seven year attempted murder conviction.

In the instant petition, petitioner raises nine grounds as follows:

> Ground One: Ms. Killian was denied due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution by the Deputy District Attorney's knowing use of false evidence in her trial.
>
> Ground Two: The prosecution's failure to disclose exculpatory evidence violated petitioner's right to due process protected by the Fifth and Fourteenth Amendments to the U.S. Constitution.
>
> Ground Three: The prosecution violated Ms. Killian's right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution by asking the jury to treat her post-arrest silence as evidence of guilt.
>
> Ground Four: Ms. Killian was denied effective assistance of counsel under the Sixth Amendment to the U.S. Constitution because her attorney's deficient investigation and performance at trial prejudiced the outcome of her trial.
>
> Ground Five: Ms. Killian was denied her Sixth Amendment federal constitutional right to effective assistance of counsel at trial due to her attorney's actual conflict of interest.

Ground Six: Ms. Killian was denied her Sixth Amendment federal constitutional right to effective assistance of counsel on appeal.

Ground Seven: Ms. Killian was denied her Sixth Amendment federal constitutional right to conflict-free counsel on appeal.

Ground Eight: Ms. Killian was denied a fair trial under the Sixth Amendment of the U.S. Constitution by the cumulative violations of her right to due process protected by the Fifth and Fourteenth Amendments, and her rights to effective and conflict-free assistance of trial counsel protected by the Sixth Amendment.

Ground Nine: Ms. Killian was denied a fair trial under the Sixth Amendment of the U.S. Constitution by the cumulative violations of her state and federal rights to due process and her state and federal rights to effective and conflict-free assistance of trial counsel.

Petition, filed October 27, 1997.

By order of April 26, 1999, this court scheduled an evidentiary hearing on specific claims, and denied such a hearing on others. The court also deferred issues that did not require an evidentiary hearing in any event because such issues could be decided as a matter of law. The evidentiary hearing was held on July 12, 1999. Although many of the issues leading up to a granting or denial of the evidentiary hearing were discussed at length in the April 26 order, there is no feasible way to simply reference that discussion herein. This is so because the context of some of the issues upon which evidence was taken overlap with issues on which evidentiary hearing was denied, and in any event, the evidence received

necessitates substantial discussion. Therefore, these Findings and Recommendations are complete unto themselves, and repeat where appropriate the previous discussion.

For the reasons discussed herein, the court recommends that the petition be denied.

Background Facts

The background facts are taken from the opinion of the state Court of Appeal in the underlying case. Although the substance of some facts might be disputed, the facts serve well as a general introduction to the complex issues that follow. The individually discussed issues contain additional or supplemented facts as required.

> In fall 1981, defendant Gloria Killian, who had recently dropped out of McGeorge Law School after completing most of her third year, resided with her boyfriend Rick Hewitt at the home of Virgil Fletcher, a coin dealer. Defendant learned from Fletcher, a part owner of Allied Coin Company, that Edward Davies, the victim, had recently purchased silver coins valued at $27,000 from Fletcher and his partner, Charlie Duncan. Defendant began to question Fletcher about Mr. Davies's [sic] habits. She asked Fletcher whether Mr. Davies dated younger women and where Mr. Davies lived and shopped. Defendant then contacted a friend, Neva Snyder, asking that Snyder introduce her to someone who might be interested in committing a residential burglary for a share of the crime proceeds. Snyder introduced defendant to Gary Masse. Defendant informed him she and "her people" wanted him to do a "job," describing the Davies's [sic] robbery and promising more lucrative "jobs" would follow if Masse successfully robbed them and split the proceeds with her.

A few days later, defendant showed Masse the Davies's [sic] home at 8925 Rosewood Drive. She explained the Davies owned a silverware set valued at $8,000 and that Mr. Davies would divulge the location of his extensive coin collection if Masse threatened Mrs. Davies in his presence.

During the following weeks, defendant pressured Masse to commit the robbery. Masse enlisted the help of his cousin, Stephen DeSantis. Defendant initially voiced opposition to DeSantis's involvement in the plan, but finally agreed to allow him to participate. The three discussed the robbery on several occasions.

On December 9, 1981, DeSantis called Masse and arranged to meet him on a street near the Davies home. DeSantis's brother Robert drove DeSantis to the designated meeting place. DeSantis had acquired telephone repair equipment and a telephone truck in preparation for the crime. DeSantis and Masse, armed with guns, drove by the Davies's [sic] home in the telephone truck, planning to gain entry into the house by posing as repairmen. The plan was foiled as Mr. Davies was not at home. They then drove to Robert DeSantis's house and Masse discarded his gun and silencer as he felt the weapon was "too bulky and big." When they returned to the Davies's house, Mr. Davies was home.

DeSantis, dressed as a repairman and armed with a revolver, rang the doorbell while Masse sat in the truck. After Mrs. Davies allowed DeSantis to enter the house, he pointed the revolver at the couple, ordered them to lie down on the kitchen floor, hogtied and handcuffed them, and threw a bedspread

over their heads. When Masse entered the house a short time later, DeSantis was interrogating Mr. Davies, holding a knife to Mrs. Davies's throat and threatening to cut her throat unless Mr. Davies revealed where his silver and gold was hidden. Mr. Davies insisted his money was kept in a safe at Allied Coin Company. The men ransacked the house and garage, stuffing six suitcases with silver coins taken from safes which were pried open. They also took a valuable silverware set from the dining room. While Masse was loading the suitcases into the Davies's car, a Peugeot, DeSantis shot Mr. Davies in the head. When Masse returned to the house he observed DeSantis shoot Mrs. Davies in the right temple.

Masse and DeSantis then drove to the home of Robert DeSantis in the Davies's car. After unloading the suitcases into the back of Stephen DeSantis's van, Masse drove the Peugeot to a parking lot and abandoned it. Masse and DeSantis then returned to the Davies's home. While Masse waited in the car, DeSantis reentered the house to remove the handcuffs from the couple. DeSantis then shot Mr. Davies in the head a second time. Believing both victims were dead, the men drove the telephone truck out of the area and abandoned it. The two then separated. Stephen and Robert DeSantis later returned to the Davies's house a third time so that Stephen could pick up the large chest which had held the silverware set. Defendant was not present at the robbery nor was she informed that it would take place on December 9.

Mr. Davies died as a result of his injuries. Mrs. Davies crawled to the telephone but discovered

the line had been severed. She waited until morning and crawled to the sidewalk where she was discovered by a passerby.

When the police arrived, Mrs. Davies informed them her husband was dead inside the house. The responding officer entered the house to check for suspects and to examine the deceased victim. Police personnel reentered the house several times during the next two days while conducting their investigation. Mr. Marks, a relative to Mrs. Davies, accompanied the police into the house several times during the investigation.

On December 10, 1981, Masse received a call from defendant requesting he meet her at Neva Snyder's house. Upon meeting defendant, she informed Masse she had heard about the robbery and murder on the television news and she demanded her share of the coins. Fearing he would be implicated in the murder, Masse denied he was involved in the robbery and refused to disclose DeSantis's [sic] last name to defendant.

On December 14, 1981, police received an anonymous phone call identifying DeSantis and Masse as the perpetrators of the crime. After police attempted to locate Masse, his wife, Joanne Masse, told the officers defendant had planned the robbery. Masse surrendered himself to police on December 17, 1981. Defendant was arrested the same day but the charges were dismissed in May 1982.

In May 1983, Masse was convicted of first degree felony murder and sentenced to life without possibility of parole. After judgment was imposed he

contacted the Sacramento Sheriff's Department and implicated defendant as the initiator of the robbery. In attempting to elicit background information about Stephen DeSantis, police officers questioned Masse about other crimes, promising that he and his wife would not be prosecuted for any other crimes to which he alluded. After Masse cooperated and tape recorded a statement implicating defendant, the district attorney wrote a letter to the judge requesting that he recall Masse's life sentence and reconsider a more lenient sentence. The sentence was recalled and Masse remained unsentenced at the time defendant was rearrested.

In September 1983, defendant and Robert and Stephen DeSantis were charged with first degree felony murder (count I -- § 187, subd. (a)), attempted murder (count II -- §§ 664, 187, subd. (a)), burglary (count III -- § 459), two counts of robbery (counts IV and V -- § 211), grand theft of the car (count VI -- § 487.3) and conspiracy (count VII -- § 182). The information alleged three overt acts were committed in furtherance of the conspiracy: (1) that Stephen DeSantis entered the Davies's [sic] residence on December 9, 1981; (2) that defendant went to the Davies's [sic] door sometime prior to the actual robbery in an unsuccessful attempt to gain entry into the home for Masse and DeSantis, and (3) that Robert DeSantis drove Stephen DeSantis to meet Masse in the Rosemont area on December 9.

Prior to her trial, defendant moved to continue any testimony from Masse until after he was sentenced. The motion was denied. Defendant also joined in Stephen DeSantis's motion to suppress evidence of photographs taken of the crime scene during the

three-day investigation conducted by police. This motion was also denied. Defendant's motion for a separate trial was granted.[1/]

Masse was the key prosecution witness in defendant's trial. He testified that defendant conceived the plan to rob the Davies and that she recruited him to carry out the crime. He claimed she had participated in an unsuccessful attempt to rob the Davies on a prior occasion in which defendant rang the doorbell at the Davies's house, feigned car trouble and requested use of the Davies's phone in hopes of gaining entry for Masse and DeSantis. At that time Mrs. Davies, however, refused to permit defendant to enter the house. Masse also stated defendant arranged to receive one-half of the stolen property. He acknowledged that he and DeSantis robbed and shot the victims without defendant's specific knowledge as to the time but that defendant demanded her one-half share of the stolen property after learning the robbery and murder had occurred.

Mrs. Davis testified that several weeks prior to the robbery a woman had knocked on the door asking to use the phone but she had denied the woman entry into the house. Mrs. Davies stated the woman had a similar appearance to defendant but was unable to identify defendant as the culprit. She explained that the head wounds she suffered caused her to become partially paralyzed in her face and that she was totally

---

1. Robert DeSantis pled guilty as an accessory to the crime under section 32 and was granted three years formal probation on condition he serve eight months in county jail. Stephen DeSantis was sentenced to death after a jury convicted him on all seven charges.

deaf on the right side.

Virgil Fletcher testified defendant had asked him numerous questions about the Davies prior to the robbery and that she jumped up, stating "'Oh my God, look at that'" after learning of the murder from the television news.

Evidence of defendant's planning activities consisting of several pages from an automobile trip and maintenance ledger seized from her at the time of her arrest were admitted. On one page defendant had written "'screen door latched,'" '"where garage,'" "'she always waiting in window,'" and "'don't approach at coin shop.'" On a second page defendant had written a description matching that of the Davies, followed by the words "gloves, tape, rope and scanner." A third page listed the address "8933 Rosewood," two doors down from the Davies's residence, and the address had been scratched out in pen.

Defendant testified in her own behalf, denying any knowledge of or involvement in the planning of the robbery. She claimed she had worked as a process server during 1980 and intimated the Rosewood address listed in her car ledger was probably an address she visited to serve a subpoena.

Defendant was found guilty of all seven counts. The jurors found true the two overt acts involving Stephen and Robert DeSantis but they were unable to agree whether defendant actually participated in a prior unsuccessful attempt to rob the Davies.

> Defendant was sentenced to state prison for seven years for count II (attempted murder -- §§ 664, 187, subd. (a)), to a consecutive term of 25 years to life on count I (murder -- § 187, subd. (a)) and to concurrent middle terms on each of the remaining charges (counts III-VII). This appeal followed.

Court of Appeals Opinion, Exh. 1 to Answer.

Petitioner objects to the following factual assertions made by respondent in the answer:

> (1) that Ms. Killian's notebook contained a description of Mr. and Mrs. Davies . . . (2) that Ms. Killian testified to knowing that Hord had provided information to Masse concerning the Elizabeth Lee robbery . . ., and (3) that Ms. Killian "asked her friend Neva Snyder, to introduce her to someone that might be interested in committing a residential burglary." . .

Traverse, at 2, n.1.

Petitioner's first objection is well founded. Although the transcript concerning the notebook contains other information about the location and details of a house alleged to belong to the victims as well as an address two doors down from the victims' house, it did not contain a description of Mr. or Mrs. Davies.

In regard to the second objection, the transcript itself indicates that petitioner testified only that she heard testimony by Masse that he got information about Elizabeth Lee and how to rob her from Robert Hord. RT [state trial] 975.[2/] The

---

2. "RT [state trial]" refers to petitioner's state trial transcript; "RT [DeSantis]" refers to the trial transcript of petitioner's severed co-defendant Steven DeSantis, and simply "RT" refers to the evidentiary hearing transcript in this federal habeas corpus proceeding.

transcript does not state that she independently knew this information.

The third objection also has merit. A review of the transcript pages cited by respondent on page 5-6 of its answer contain no mention of any request by petitioner for Neva Snyder to introduce her to someone who might be interested in committing a burglary. The only tangential reference is in Masse's testimony where he states that Neva Snyder, who knew Masse stole and was no good, wanted to introduce petitioner to him. RT [state trial] 289. Masse then testified that after petitioner was introduced to him, they talked about a job she wanted to have done. RT [state trial] 290.

Standard of Review

None of the issues discussed herein were raised on direct appeal, but were all issues raised on petitioner's habeas corpus filing with the California Supreme Court. On November 4, 1996, the state petition was filed; and respondent was directed to file an informal response. After petitioner's reply to that informal response was filed, the state supreme court denied the entire petition on its merits, without opinion, on September 17, 1997.

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). State court legal, or mixed factual/legal, decisions could not be overturned unless contrary to, or involved an unreasonable application of, "*an authoritative decision of the Supreme Court.*" Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999) (emphasis in the original). The statute containing the standard of review is as follows:

> (d)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The difficulty is in determining, consistent with Congress' intent, the proper mode of analysis to be applied in evaluating a claim under § 2254(d). In Moore v. Calderon, the Ninth Circuit determined that pure questions of law would be judged by the "contrary to" standard (de novo), and mixed questions of fact and law would be subject to the "unreasonable application of" standard (deference). The Ninth Circuit revisited this issue in Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999) vacated Kramer v. Davis, __U.S.__, 120 S. Ct. 1001 (2000). In Davis, the Ninth Circuit essentially rejected the formula set out in Moore v. Calderon, supra, and observed that the terms "contrary to" and "unreasonable application of" "reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." Id. at 500. The court further explained,

> The terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the

> same: to ensure the objective that state courts follow controlling Supreme Court law. [footnote omitted.] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at 500.[3/]

In Davis, the Ninth Circuit did not describe the standard to be applied in determining whether a state court decision involved an unreasonable application of federal law. However, the Ninth Circuit indicated that if the state court had "failed to apply" the appropriate precedent, no AEDPA deference would be due. Furthermore, if the state court had "misinterpreted" the controlling precedent, no AEDPA deference could be shown by the federal courts, as would be the case if the application of precedent was simply "unreasonable."

---

3. In Davis, the Ninth Circuit also indicated that it was not adopting a "pure law vs. mixed question" approach:

> In a footnote in Moore v. Calderon, 108 F.3d 261, 265 n. 3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of law and fact. While this is certainly true in some instances, in the Moore footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

Id. at 500 n. 7.

The Davis court itself conducted a de novo review. In a more recent decision, LaJoie v. Thompson, __F.3d__, 2000 WL 95935 (9th Cir. Jan. 31, 2000), the Ninth Circuit again walked up to a holding that *both* the "clearly established" and "unreasonable application of" prongs of § 2254(d) would entail a de novo review of any aspect of a state decision containing a federal law legal question, but its reliance on the now vacated Davis decision, and its unwillingness to directly so hold, indicates to the undersigned that the issue remains open in the Ninth Circuit. The difficulty with holding that both prongs entail de novo review is that such an interpretation would essentially re-institute the standard of review prior to AEDPA—a doubtful reading of Congressional intent. Thus, the undersigned will utilize his previous analysis relying on out-of-circuit authority which seeks to determine the standard by which federal courts should review "unreasonable" applications of law to facts.

In applying that framework, the undersigned has applied the standard used by the First, Fifth, Seventh, and Eleventh Circuits, and most recently the Sixth and Fourth Circuits as well. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), revsd. on other grounds, 117 S. Ct. 2059 (1997); O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998), and Neely, supra.[4/] In

---

4. Recently, the Sixth Circuit held that it was adopting the Drinkard standard. Nevers v. Killinger,169 F.3d 352, 361 (6th Cir. 1999):

> Since we heard oral argument in this case this Court, in Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319 (6th Cir. Nov.20, 1998), has stated its agreement with the "reasonable jurist" approach taken by the Fifth Circuit in Drinkard, 97 F.3d at 769. Today we state as well our agreement with the standard enunciated by the

defining this standard, the Fifth Circuit held that "an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one

---

> First Circuit, namely, that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25; accord Hall, 106 F.3d at 748-49 ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). We recognize that the First Circuit specifically rejected Drinkard's "reasonable jurist" test when articulating its own standard, O'Brien, 145 F.3d at 25 n. 7. We think, however, that the two are not mutually exclusive; rather, both standards can be employed to aid in arriving at the correct answer to the question of "unreasonableness." The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," Drinkard, 97 F.3d at 769, if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien, 145 F.3d at 25.

The Fourth Circuit in Green, which the Ninth Circuit cites in Davis, adopted the Drinkard standard. See Green, 143 F.3d at 870, 873.

view that the state court ruling was incorrect." Drinkard, 97 F.3d at 769. The standards applied by the First and Seventh Circuits are similar. See Lindh v. Murphy, 96 F.3d at 870; O'Brien v. DuBois, 145 F.3d at 25.

The next issue within the standard of review section involves whether any deference can be paid to an unexplained decision of the state supreme court. In the instant case, the California Court of Appeal issued a written decision denying petitioner's appeal; however, the appeal does not touch upon the issue in this habeas. The California Supreme Court denied the petition for review without comment or citation.

In an initial opinion, the Ninth Circuit held that claims not addressed in a reasoned state court opinion were entitled to no deference, and the federal court should decide the issue de novo. Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999). However, that opinion was vacated on rehearing, and the revised rule for claims not addressed in a written decision became that the federal court should "independently" assess the state court decision in light of the AEDPA standard—whether the correct Supreme Court law was applied, and whether the application was unreasonable in light of the clearly established federal law. Delgado v Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999). However, the Supreme Court has recently vacated Delgado. Lewis v. Delgado, __ U.S. __, 120 S. Ct. 1002 (Jan. 24, 2000).

Because Delgado has been vacated, the lack of a reasoned decision addressing all of petitioner's federal claims is not an issue. Summary denials, without more, constitute a ruling on the merits. In re Clark, 5 Cal. 4th 750, 769-770, 21 Cal. Rptr. 2d 509, 521 and n. 9 therein; see also Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992). Therefore, even though the California Supreme Court denied the petition for review without comment or citation, its decision on mixed question of law and fact, i.e., unreasonable application questions, should be entitled to AEDPA deference as defined above.

One final twist to the standard of review issue, an important and sometimes dispositive issue, is that the court has held an evidentiary hearing, and facts presented to the state supreme court have been clarified and supplemented herein. It is not possible to employ a deferential standard of review to application of law to facts, when the facts at issue before the state supreme court were not precisely the same as the supplemented facts before this court.[5/] Thus, for those issues where the court has taken evidence at evidentiary hearing, the court will employ a de novo review. Where the issues did not call for an evidentiary hearing, the deferential standard will apply.[6/]

---

5. To the extent respondent has raised an exhaustion objection to the supplemented facts, the court overrules such objection. It cannot be the law that whenever a federal court holds an evidentiary hearing, and necessarily develops facts which were not before the state supreme court, the habeas proceeding automatically becomes unexhausted. If such were the case, the holding of an evidentiary hearing would invariably lead to the dismissal of a habeas proceeding without adjudication of the merits. This circular conundrum leads to absurd results. See generally Weaver v. Thompson, 197 F.3d 356, 364 (9th Cir. 1999). The court issues no opinion herein on the exhaustion question when the facts developed in federal court are significantly unrelated to the facts presented to the state supreme court.

6. AEDPA deference is an important issue which may ultimately prove dispositive when reviewed at a higher level with respect to those claims for which significant evidence was not received at evidentiary hearing. The undersigned wishes to make clear, however, that none of his findings herein would change be the review de novo or deferential.

Discussion

A. Claim One - That Petitioner was Denied Due Process Because the Deputy District Attorney Knowingly Used False Evidence at Trial

1. *The Prosecutor Knowingly Utilized False Testimony on the Merits With Which to Convict Petitioner*

The court has broken out this separate "merits" subheading from other alleged perjuries of Gary Masse because of the testimony of Masse at evidentiary hearing. Petitioner argues that Masse exonerated petitioner from any wrongdoing related to the actual robbery and murder. This allegation of actual innocence was but a vague add-on point in the petition, and was subordinated within the major contention that Masse lied about his plea bargain at petitioner's trial.[7/] Respondent correctly notes petitioner's switch in emphasis concerning this claim, and argues that (1) the actual innocence assertions are not related to any cognizable federal claim; (2) that the actual innocence assertions are in fact not true; (3) that the expanded Claim One is of dubious status from an exhaustion standpoint; that the expanded claim is barred by the "new rule" holding of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1061 (1989).

Exhaustion and Teague concerns aside, the court does not agree with respondent that petitioner's claim of actual innocence is not related to a cognizable habeas corpus claim. See Herrera v. Collins, 506 U.S. 390, 400-401, 113 S. Ct. 853, 860-861 (1993) (holding that a simple claim of factual

---

7. The inquiry into alleged perjury was precipitated by Masse's post-trial letter in which he unhappily stated: "As far as I am concerned, there was a verbal agreement of no more than twelve years. *I been up front and honest as I could be when I gave you DeSantis and Killian.* I did my part all the way to the end. *I even lied my ass off on the stand for you people...*" Exhibit 46 at 2. Part of the evidentiary hearing was intended to determine whether Masse had been "up front and honest" or whether he had "lied his ass off."

innocence supported by new evidence is not cognizable in federal habeas corpus.) First, petitioner has related the claim to the prosecutor's knowing presentation of false evidence—a well recognized claim. United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, (1976); Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991). In addition, as pointed out by the court in its order for evidentiary hearing, there is Ninth Circuit law, assertedly based on established Supreme Court authority, holding that due process precludes a conviction based on perjury from being upheld regardless of whether the prosecution wittingly aided its presentation. United States v. Young, 17 F.3d 1201, 1204 (9th Cir. 1994).

Prosecutorial misconduct does not, per se, violate a defendant's constitutional rights. Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987)). The court must find that the misconduct had an unconstitutional effect on the verdict. Petitioner's claim that the prosecution manipulated Masse's testimony amounts to a claim that the prosecution knowingly used false evidence. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is 'any reasonable likelihood that the false testimony could have effected the judgment of the jury.'" United States v. Young, 17 F.3d 1201, 1203 (9th Cir. 1994) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392 (1976)) (footnote omitted); Brown v. Borg, 951 F.2d 1011, 1015-16 (9th Cir. 1991). "[T]he standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard." United States v. Bagley, 473 U.S. 667, 679 n. 9, 105 S. Ct. 3375, 3382 (1985). Under Chapman, the beneficiary of a constitutional error must prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). This standard has apparently survived the "softer" harmless error test

for other constitutional violations set forth in Brecht v Abrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993). See Kyles v.Whitley 514 U.S. 419, 433 (n.7), 115 S. Ct. 1555, 1565 (1995). But see Gilday v. Callahan, 59 F.3d 257 (1st Cir. 1995) applying a reasonable doubt standard to determine constitutional error, and then a Brecht standard to determine whether the error was harmless.

However, the court does agree with respondent that Masse's evidentiary hearing testimony is insufficient to demonstrate actual innocence of the crime with which petitioner is charged. "All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." People v. Washington, 62 Cal. 2d 777, 782, 44 Cal. Rptr. 442, 445 (1965). This aiding and abetting crime could, of course, occasion the same punishment as a conviction for felony murder in which petitioner actively took part in the actual murder. It is in this context that the evidence obtained at evidentiary hearing, and especially the harmless error standard, should be viewed.

Gary Masse is vigorously portrayed by petitioner as a person who committed perjury on numerous occasions, conceded to by Masse himself at evidentiary hearing, but who nevertheless told the truth at evidentiary hearing when it came to petitioner's non-involvement in the actual crime. The court took special pains to judge Masse's credibility at evidentiary hearing, and found him, overall, to be an enigmatic witness. There were times when Masse appeared almost incoherent in his ability to respond to a question, being easily flustered; at other times he knew quite well what he was saying. He was, at times, unable to complete an expressed thought, and again at other times, quite capable of keeping a general order to his responses. However, Masse had nothing to gain or lose by telling the truth at this hearing, and the court finds him credible with respect to his beliefs about petitioner's involvement in the crime for which she was convicted.

Petitioner's counsel initially brought out the substance of petitioner's true involvement in the Davies' robbery:

> Q. At some point in time, in your mind, Mr. Masse, did you consider that Miss [Ms.] Killian was no longer a participant in the crime that you and Mr. DeSantis planned?
>
> A. Yeah. Me and DeSantis, we stopped using her. She wasn't involved anymore. She probably thought she was, but we stopped using her.

RT 233.

At one point, believing that the question and answer methodology was simply confusing Masse, the court interrupted:

> The Court: Did you lie about any of the facts of the case. Not whether you had gone to the scene or had dinners or anything else, but whether the facts you related in the case were untrue. Did you ever do that?
>
> The Witness: Well, I had Miss [Ms.] Killian– I could only go so far with it. I could only go so far. I couldn't tell the truth because there would have been no more deals. I wouldn't have come through for them. I couldn't–
>
> The Court: I'm going to do this, and subject to the questions of the attorneys later on, you can make objection or motions to strike, but let him finish. I want you to tell me what was true about Miss [Ms.] Killian's involvement, and what was untrue about it as far as you can remember. Tell me about her involvement or lack of involvement.

Mr. Weinberger: Could I add, Your Honor, that he include that with respect to the involvement of others as well?

The Court: No. I just want to get him involved with Miss [Ms.] Killian. You can ask him later. But as far as Ms. Killian had or didn't have to do with it, I want you to start from the beginning and tell it all, and we'll have questions from the attorneys after that.

The Witness: I met Killian at Neva Snyder's house, and at this time she [Killian] knew about a robbery that some old people had some coins, and I was interested at the time. I got ahold of Steven [DeSantis], and he started putting it all together.

We tried to get access to the house. We used Gloria [Killian] on a couple of occasions to try to get in the house, but that never worked out, but it never worked out, so we kept going back to the scene of the crime. We were going around there too much at the time, and we backed away from it, this, here, put Gloria really out of the whole picture.

We robbed the house. She [Killian] wasn't going to get no more. Her share was ours. It's over with– for her, but, you know, everything is basically true up to the point where I come back into the picture, because I wasn't going to do the robbery. DeSantis, I told him I wasn't going to do it; he needed to get somebody else, but when I went back over to Neva Snyder's house, she–

The Court: Whose [Who's] she?

The Witness: Neva. At this time she was concerned about the loot, because she knew that Gloria– we pushed Gloria out of the way. She knew that the only reason Gloria was there was she, Gloria, would have gotten half of the money, and it would have been secured, but Gloria, come to find out, she wasn't the master planner of the whole thing. They just used her. They needed a third party. They needed a third party to make it look like it was her thing so it didn't come back to the guy who really set the whole thing up, so therefore, me, knowing this, now when I go into the place, I have to kick down now. They're going to get their share of the money, but at the same time, the guy that set it up, as soon as he gets his money, we're going to rob him now. Now we're going to rob him.

So Gloria, she's still there. She doesn't even know she's out of the show. She's not even in the picture anymore, but up until all the way to the trial, we went and scoped the house out. I kept it as much as I can, and even Tom Brown, I told him I can't give her up. I can't give them people up. I'm not going to give them up, and he knew, and all I had to do was give him her, and I had to carry that on my shoulders for all those years.

All she got, 30 something to life for attempted robbery. It [sic] turned out to be the big master planner. She didn't plan shit. She didn't have my people. She didn't have no people. All she had was herself. She just wanted a little bit of money, just like I did, and nobody was supposed to get hurt at that house. It was just a simple robbery. They weren't even going to call the cops about the coins. The coins didn't even come up in court. She didn't know

what her husband had out in the garage. She wasn't going to tell anybody what her husband had, but I tried to keep as much of the truth as I could.

All I was trying to prove was I didn't shoot them people. I got caught right in the middle of the shit, and I was trying to let the evidence all out, and nobody gave a shit about the evidence at all. They wanted her. They wanted her, and I had to give them her, and after I gave them to her, it didn't mean nothing to them.

The Court: Now, you stated in the beginning you and Miss Killian had gone out to the Davies' house. Was there anyone else with you when you went out and scoped it out, so to speak?

The Witness: I don't believe so, on the first time. I think it was me and her the first time. I can't be sure.

The Court: Did your wife ever go out with you?

The Witness: Yes. My wife was involved, too.

The Court: How was she involved?

The Witness: Well, I was going to use my wife. She spent – she spent all the money. She had access. She dug the money up. They knew she had the money. She left the kids, everything, just had a good time.

The Court: What specifically did your wife do in connection with going out to this place, the Davies' place?

> The Witness: She went out there with me, and she was going to do it. There have been times when me and her was going to do it ourselves, but we never ended up doing it.
>
> The Court: Did your wife go up to the door or ring the doorbell or ring the bell?
>
> The Witness: No.
>
> The Court: Did Miss Killian ever go up to the door or ring the bell?
>
> The Witness: Yes, on one occasion, I believe.

RT 261-265.

Petitioner's attorney thereafter brought out the facts that Masse had embellished petitioner's role in the conspiracy because he wanted his deal, wanted his wife out of the picture, and feared retaliation from the persons who were "really" involved.

Masse had testified at petitioner's state trial to the following:

1. Petitioner, and "her people" had "set up the job," Exhibit 42, RT [state trial] at 334, 443; (this could be considered truthful, if asking Masse to perform the robbery was "setting up" the job) (when asked if petitioner had supplied the plan for how the robbery could be done, Masse testified that he could not remember, Exhibit 42, RT [state trial] at 442).
2. Petitioner, "and her people" continued to press Masse to perform the robbery, even after the initial aborted attempt that involved petitioner, Exhibit 42 RT [state trial] at 442; (Masse equivocally repudiated this statement at evidentiary hearing, RT at 273-74; Masse could not remember the substance of any conversations he may have had with petitioner about the robbery that occurred after the aborted attempt, RT 281).
3. Petitioner had "her people" behind her involvement in the

robbery, Exhibit 42 RT [state trial] at 292, 297, 300 and other references (She didn't have my people. She didn't have no people. All she had was herself." RT 263).

4. At the time the crime was committed, Masse still had an agreement to split, at least his share of the proceeds, with petitioner, Exhibit 42 RT [state trial] at 312, 443 (this statement directly conflicted with his evidentiary hearing testimony that petitioner was no longer involved in his mind, and that she would receive no proceeds (see above quote).[8/]

With the exception of testimony concerning petitioner's "set-up" of the job, the court finds that Masse's half-truths related at petitioner's state court trial, and especially the outright falsehood about petitioner still sharing in the proceeds, would be considered perjurious. The issue becomes—did this perjury materially affect petitioner's trial under the governing "reasonable doubt" standard.

The evidentiary hearing testimony itself does not exonerate petitioner. Nor does it put the facts that were presented at trial in such a false light that petitioner was convicted on the basis of perjured testimony. Masse confirmed at evidentiary hearing that petitioner had made an agreement with the other co-conspirators to profit from a robbery—she had taken part in initial overt acts—she was involved in the initial stages of the planned robbery, even to the extent of attempting to gain entry to the Davies' residence—that petitioner continued to believe herself part of the conspiracy and entitled to part of the robbery proceeds. This "I'm-still-part-of-the-conspiracy-

---

8. Petitioner asserted that Masse unequivocally stated at petitioner's trial that no one else was involved in the robbery/murder citing to Exhibit 42 RT [state trial] at 366. However, Masse did testify at that time that "I believe I said I feel that somebody else knew about it or something, but at that time I couldn't remember, I don't think." Id. Petitioner's assertion that Masse outright lied about the lack of involvement of others is a bit stretched itself.

belief" was corroborated by petitioner's post-robbery/murder statement after she heard on the television that the robbery/murder had actually taken place. The critical testimony that made petitioner part of the conspiracy remained unaltered from petitioner's trial to the present day. And, this critical testimony remains corroborated by petitioner's notebook evidence concerning the Davies' residence and neighborhood, even if the evidence is somewhat less dramatic than related by the Court of Appeal. It remains corroborated by Fletcher's testimony that petitioner was seeking ways prior to the robbery to get to know Mr. Davies better (did he want to date younger women).

In California, "[f]or purposes of complicity in a cofelon's homicidal act, '[t]he conspirator and the abettor stand in the same position.'" People v. Pulido, 15 Cal. 4th 713, 724, 63 Cal. Rptr. 2d 625, 632 (1998). Conspiracy and California's vicarious felony murder rule, is much like the old saying—in for a penny, in for a pound. A conspirator remains liable for all forseeable acts of her co-conspirators despite the conspirator's lack of actual involvement in unplanned violent acts, or even the conspirator's lack of intent that such acts take place. United States v. Fonseca-Caro, 114 F.3d 906, 907-908 (9th Cir. 1997); People v. Superior Court (Shamis), 58 Cal. App. 4th 833, 844, 68 Cal. Rptr. 2d 388, 394 (1997). The only effective way to terminate such liability is to make an affirmative, unequivocal break with the other conspirators prior to completion of the criminal act. United States v. Loya, 807 F.2d 1483, (9th Cir. 1986); People v. Jackson, 13 Cal. 4th 1164, 1221, 56 Cal. Rptr. 2d 49, 81 (1996), citing People v. Belmontes, 45 Cal. 3d 744, 793, 248 Cal. Rptr. 126 (1988). Petitioner never accomplished this break. On the contrary, petitioner thought of herself as initially involved; she continued to think herself involved, and it was *her* intention combined with the early-on agreement and overt acts that supplies the necessary associational predicate for

felony murder.[9]

Thus, the court finds that any perjurious embellishment of petitioner's involvement that Masse may have reported to the police or testified to at trial, and conversely, any diminishment of the role of others, e.g., Joanne Masse, Neva Snyder, Robert Hord, is not perjurious in a material sense, i.e., petitioner's conviction does not rest upon perjured testimony. It may well be from a moral culpability perspective that petitioner's degree of complicity was less than that presented to the jury by Masse at petitioner's trial. However, legal guilt, not degree of moral complicity, is at issue here. Petitioner is not actually innocent of the crimes for which she was convicted.

It is also important to keep in mind that the issue here is not simply whether the jury would have been disgusted with Masse's half-truths about petitioner's involvement in an impeachment sense had that the perjury been brought out subsequent to Masse's original, direct testimony. The point to be decided here is whether a reasonable fact finder would have had a reasonable doubt about petitioner's involvement because of the perjury. Because petitioner clearly remained "involved" in the initial stages of the robbery set up, the court finds that Masse's half-truths and falsehoods were harmless to petitioner's conviction beyond a reasonable doubt.

---

9. Thus, it may well be that petitioner "didn't plan shit," RT 263, or that petitioner was being "just used, id.," by others involved in the robbery planning, or that the existence of petitioner's "people" was simply a figment of petitioner's or Masse's imagination. The fact of the matter remains that petitioner was involved in the initiation of the Davies' robbery. Masse's statement that he did not believe petitioner to be involved "anymore" stands as unintended, but cogent, proof that petitioner was involved prior to that time in his mind.

Therefore, the court need not further discuss exhaustion or Teague issues.[10/]

2. *Perjured Testimony With Respect to a Plea Bargain And Other Impeachment Matters*

Petitioner claims that chief prosecution witness Gary Masse lied when he testified that he had no agreement with the prosecution for a reduced sentence in exchange for his testimony against petitioner. Petitioner claims that in fact there was a deal, and that the prosecutor condoned the false testimony and tried to prevent the truth from being disclosed.

a. The Cleland Letter

In support, petitioner primarily refers to a letter, dated April 18, 1985, about eight months prior to petitioner's trial, in which the prosecutor informed Masse's sentencing judge (Judge DeCristoforo) that he would not object to a renewed Williams motion to strike the special circumstances based on Masse's continued cooperation and truthful testimony at petitioner's trial.

In pertinent part, the April 18, 1995 letter to Judge DeCristoforo states:

> While Gary Masse's criminal conduct cannot be condoned, his cooperation, in my judgment, deserves consideration by the Court in determining the appropriate sentence. To that end, the People plan not to object to a renewed Williams Motion to strike the

---

10. The court also need not make any findings whether the prosecution was so reckless in its pursuit of petitioner's conviction, with its enticement of, and reliance on, Masse's trial testimony, such that it had complicity in Masse's perjurious statements. The court has assumed such for the purpose of analysis, and has focused its discussion on the appropriate harmless error standard. Moreover, given the above discussion, it follows that the non-prosecutor-aided, perjury harmless error standard would be decided adverse to petitioner.

special circumstances.

> In taking this position, I make the assumption that Mr. Masse will conduct himself properly while incarcerated and will continue his cooperation by testifying truthfully at the trial of Gloria Killian.

Exh. (Evid.Hearng. "EH") 38.

This letter was not disclosed to petitioner prior to, or during, her trial. As a result, petitioner claims that the prosecutor suborned perjury, or at the very least should have corrected Masse's testimony that he had no deal with the government, and that he did not know whether the District Attorney would object to a modification of his sentence.

Masse essentially testified at petitioner's trial that there was a possibility of a plea agreement. The court need not analyze Masse's testimony in depth at this point and compare it to the presently known facts because the evidentiary hearing brought out additional facts which completely negate petitioner's claimed constitutional violation of subornation of perjury on account of the letter. Prosecutor Cleland testified that while the related DeSantis jury was deliberating, he memorialized his thinking about the prosecution's "deal" it would recommend for Masse's cooperation in the DeSantis trial as well as the upcoming Killian trial. Cleland memorialized his thoughts at this juncture in that he did not want it to appear that he was basing any deal for Masse on the actual result of the DeSantis trial. Evidently believing that a memo to the prosecution file dated at this time would be open to question as to its date of preparation, Cleland sent his memorialization in a sealed letter addressed to Masse's sentencing judge with a request that the letter not be opened until Masse's re-sentencing was at issue. See RT at 286-288, 293-294. See also Exhibits

38, 39.[11/] Cleland purposefully did not communicate the substance of this letter to Masse or his attorney at the time, although he surmised that petitioner's attorney (Thielen) had somehow speculated about it or otherwise acquired knowledge about it. RT 288. Cleland believed that this uncommunicated-to-Masse sentence recommendation was not discoverable. The letter was opened for the first time, and filed in the state court, on November 3, 1986—*subsequent to the time Killian was convicted.* There is no evidence that the letter was opened prior to the time indicated, that copies of the otherwise sealed letter were disseminated, or that the precise terms of the sealed letter were orally communicated to Masse or his attorney.

Whatever other evidence petitioner may have concerning an undisclosed deal with Masse (discussed below), it is now clear to the court that the April 1985 Cleland letter, purposefully kept sealed from the review of all (including Masse and his counsel), is *by itself* not actionable under either a subornation of perjury or failure to disclose rubric. No party would contend that a prosecutor's personal thoughts concerning a proposed deal, internal musings, an internal discussion about a proposed deal, or a memo to file concerning what type of deal he might offer a cooperating defendant, is evidence of a deal itself with the cooperating defendant. There has to be some communication of that deal to the defendant before it can be argued that a plea agreement might impose taint on the witness testimony. Plea bargains take on the aspects of a contract, see, e.g., United States v. Johnson, 199 F.3d 1015, 1020 (9th Cir. 1999), and it is only common sense law that no contractual plea bargain is possible absent a communicated offer. In the same light, a sealed letter containing the prosecutor's recommendation, even one sealed outside of the prosecutor's office but not open to anyone's perusal, cannot constitute a

---

11. Exhibit # refers to exhibits filed in connection with the evidentiary hearing. If the court has utilized exhibits attached to the petition, the text will so note.

communication of an offer.

In sum, with respect to the Cleland letter, petitioner has shown neither that the prosecutor was aware of its dissemination, nor has she shown that Masse was aware of the letter as he gave testimony at petitioner's trial. Even assuming that Masse testified at trial at odds with the content of the letter (a plea agreement was only "possible"), such testimony could never qualify as "perjured" based on the existence of the letter given Masse's lack of knowledge of the letter. Moreover, if it is a requirement that the prosecution be complicit in perjurious testimony, Cleland would have had no reason to believe that Masse was testifying the way he was because of the letter. Without public dissemination of the letter, and in the absence of other evidence, Masse's "possibility" testimony was accurate.

The court is not stating that the letter could not be confirmatory of some other evidence relating to a deal with Masse, and hence relevant in that independent sense. Nor is the court stating that attorney-work product in the criminal area nullifies a prosecutor's due process or Brady/Bagley obligations. See the concurring opinion of Justice Breyer in United States v. Armstrong, 517 U.S. 456, 475, 116 S. Ct. 1480, 1491 (1996). The court is simply stating that the *uncommunicated* letter cannot itself be used as a basis for subornation of perjury, or even Brady or Bagley evidence. (See below)[12/]

---

12. Petitioner argues that the prosecutor's Brady/Bagley obligations survived the end of petitioner's trial. While this is true as a general legal proposition, petitioner mistakes the nature of the constitutional violation which she asserts. There is no doubt that if a deal had been communicated to Masse prior to petitioner's trial, the prosecutor would have been under a continuing obligation to disclose that fact up to the present time. However, petitioner has been shown to be mistaken if she believes that the April 1985 letter was communicated to Masse, either directly or indirectly, prior to petitioner's trial.

b. Other Evidence of a Plea Agreement

Although petitioner rested Claim One of her petition on the April 1985 letter, petitioner also presently claims that there was other telling evidence that the prosecution had indeed made a deal with Masse, and nevertheless permitted Masse to testify that there was no deal made. The court reviews—first, Masse's testimony at petitioner's trial concerning whether a deal was made—second, whether Masse himself believed there was a deal—third, whether the prosecution believed there was a communicated deal—and fourth, whether any perjury about the existence of a deal was prejudicial.

Petitioner's trial attorney, Thielen, questioned Masse in the following manner:

> Q. As you sit here today, you do feel that the rest of your life is going to be affected by your testimony; is that correct?
>
> A. Yeah, you could say that.
>
> Q. Well, I'm asking you if that's – if that's the way you feel, if that is true in your own mind.
>
> A. I feel that I got to tell it like it is.
>
> Q. And you got it – you expect to get a reduction in your sentence after you finish testifying here, don't you?
>
> A. You know, whatever way you want to say it, you know.
>
> Q. Do you expect Mr. Cleland to go to bat for you at the completion of your testimony if Mrs. Killian is convicted?
>
> A. If Mrs. Killian is convicted or not, you know, that don't have nothing to do with it. It's what's, you know, the truth, you know. I had to go with the truth, bring the truth out.

Obviously, an uncommunicated deal cannot taint a cooperating defendant's testimony.

RT. 367-68.

Further, the prosecutor questioned Masse about his future sentencing for his 1983 conviction, wherein he would appear before Judge DeCristoforo. RT. 426-27. Masse was asked whether Judge DeCristoforo would be impressed with anything less than the truth in regard to Masse's testimony in the Killian trial. Masse responded that he knew he had to tell the truth and that if he lied, he would not favorably impress the sentencing judge. RT. 428.

Petitioner claims that when Mr. Thielen attempted to question Masse about his agreement with the prosecutor and future sentencing, the prosecutor, Mr. Cleland, prevented the testimony from coming out. The full context of the testimony was as follows:

> Q. On June 8th when you told the officers and Investigator Brown about the other crimes that you were involved in, I believe Mr. Cleland asked you if you felt at that time that there was no other sanction the judicial system could take against you, that you were already sentenced to the maximum, life without possibility of parole. So there was – you had nothing to lose at that point; is that correct?
>
> A. In a way. In a way.
>
> Q. *But at that same time on June 8th you knew that there was the very real possibility of coming out of this with a twelve-year sentence?*
>
> A. It could be possible.
>
> Q. When you reappear – when you finally reappear in front of Judge DeCristoforo for consideration of modification of your sentence, you're going to have your attorney there, aren't you?
>
> A. Yes, I am.
>
> Q. And your attorney is going to be pushing for you to get a reduced sentence for you, isn't he, or do you expect him to do that?
>
> A. I expect him, yeah, go in front of the judge with

everything, everything he can.

Q. Okay. So your attorney will in front of Judge DeCristoforo – at least your expectation is that he'll do everything he can for you to get your sentence reduced?

A. My attorney, yeah.

Q. Yes. And don't you expect the same thing from the District Attorney in front of Judge DeCristoforo when it comes time to consider modification of your sentence?

A. Well, I expect the District Attorney to present to the judge like my attorney is, you know, show him – got to show him some kind of weight.

Q. So in effect there would be no opposition to your motion for modification of your sentence?

MR. CLELAND: Excuse me, your Honor, I'm going to object. I think he's getting a little bit beyond anything Mr. Masse has personal knowledge or control over.

THE COURT: It's not what Mr. Masse has control over, it's what Mr. Masse expects. The objection is overruled.

Q. (By Mr. Thielen) Is that your expectation, Mr. Masse, that there would be no objection from the District Attorney's office when you finally go in front of Judge DeCristoforo to be sentenced or to have your sentence modified?

A. That could be. Could be. I can't answer that truthfully because I don't really know.

RT. 467-69 (emphasis added).

The clear import of Masse's testimony is that a plea agreement was possible, but that no firm deal had been communicated to him. The court now turns to the issue of whether Masse really believed that at the time, or whether he thought there actually existed a promised agreement.

Specifically, petitioner refers to the asserted fact that:

> 2. After my son, Gary, agreed to testify for the prosecution in Steven DeSantis' murder trial the District Attorney's investigator, Tom Brown, initiated a friendship with me. We had several long telephone conversations in which we discussed personal subjects such as Tom Brown's father. During these discussions Tom told me how much he liked Gary and how much time he was spending with him. He assured me that Gary would serve a maximum of twelve years in prison because he was being so helpful to the prosecution. At one point Brown said Gary would probably only be incarcerated for seven years.

Exh. AAA (petition exhibit):1-2.

That Tom Brown may have alluded to a deal with Masse's father does not tell us without doubt that such a deal was communicated to Masse, but such communication was probable. Masse testified at evidentiary hearing that he told the police (after his conviction) that in return for his cooperation in the DeSantis and Killian matters, he believed 12 years was a satisfactory agreement for his part in the robbery/murder, and that the police orally agreed with him, but refused to put the agreement in writing. RT 239-240. Investigator Brown had told Masse's father about the 12 year deal. RT 250. Masse conceded that he lied at petitioner's trial about not having a verbal agreement. RT 270-271.

Masse's latter day statements that he *knew* he had made a plea deal with the prosecution are supported by relatively contemporaneous statements that he made to the prosecution. Prior to petitioner's trial, Masse wrote to DA Investigator (Brown) and said: "The deal was I would go to a federal prision [sic]..." Exhibit 27. While this exhibit does not refer to a agreed upon time, it does, whether accurate or not,

demonstrate Masse's belief in a deal having been made. Just after petitioner's sentencing in 1986, Masse again wrote to Brown exclaiming his belief that his plea agreement had been dishonored: "...I feel that I am getting screwed around bad ... as far as I am concerned *there was a verbal agreement of no more than twelve years*." Exhibit 46.

After evidentiary hearing, and upon reflection on all the evidence, the court believes that Masse's testimony at petitioner's trial was half-truthful at best, and hence perjurious. It is now clear to the court that, correct or not, Masse *himself* believed that he had a twelve year deal, and he should have so stated. It is also clear that Masse's half-truths were evasive in the sense that whatever Masse's intellectual difficulties, he understood the impeachment potential of a plea agreement, and he was dishonestly attempting to avoid that impeachment potential to the best of his ability "to save his deal."[13/]

---

13. Moreover, in all likelihood, Masse did believe that he had a twelve year deal because of the circumstances in which he found himself after being initially sentenced to life imprisonment without the possibility of parole. As any lawyer could have told him, and as Masse and petitioner's attorney probably knew, the "life *without* parole" was a mandatory sentence for the special circumstances finding along with his first degree murder conviction. The first significant step of any deal would have to have been the striking of the special circumstances, and it is likely that this "possibility" was verbalized to Masse, not only by state officials but also his own attorney. A striking of special circumstances would have made Masse eligible for parole on a first degree murder conviction. At the time, there was confusion among the attorneys whether a life sentence with the possibility of parole would have made one's initial eligibility for parole at 12 or 16 years. RT 302. Given Masse's exhibited intellectual difficulties, Masse may well have interpreted an initial eligibility for parole as a "12 year sentence." The likelihood of the above scenario was certainly

Investigator Brown and prosecutor Cleland denied that they ever verbalized a twelve year deal (or any other deal) with Masse. RT 209 (Brown); 291 (Cleland). Normally, the court would have to make a credibility determination concerning whether the prosecution communicated such a deal to Masse, or whether he or his lawyer created the deal from informed speculation. However, the court need not finally determine whether the denials are the facts in this case, or are hyper-technical rationalizations, because *given Masse's cross-examination at petitioner's trial*, there is no reasonable possibility that Masse's perjury had an effect on the verdict.

Clearly, the jury was apprised of the "possibility" of a 12 year deal or some other re-sentencing benefit by the cross-examination, and would have taken that into account in reflecting on Masse's testimony. And, if the black and white of Masse's testimony in the transcript appears evasive to the undersigned, it probably appeared more so in person. Any reasonable juror would have inferred from the cross-examination that Masse was testifying because he believed that he would significantly benefit from that testimony—whatever the exact parameters of the deal. The jury knew Masse's sentence had been recalled. RT [state trial] 467. The jury knew that Masse was to be re-sentenced. RT [state trial] 426. The jurors knew that Masse had been previously sentenced to life without parole. RT [state trial] 439, 467. Would the jurors believe that the state would go to all the trouble to re-sentence

---

corroborated by petitioner's "uninformed" attorney's cross-examination of Masse (see text above) who labored to pin the prosecution with a "12 year deal." It is extremely doubtful that anyone connected with the prosecution of this case promised Masse a 12 year sentence outright because such an agreement would generally have required a change of plea after conviction to less than first degree murder conviction (as opposed to a mere re-sentencing on first degree murder) as well as the agreement of a judge as to the sentence.

Masse to the same sentence he had received prior to his testimony, or that a person like Masse would accept such? Of course, not. The court does not have to shed itself of common sense in reviewing this issue. This is unlike the non-disclosure case of Singh v. Prunty, 142 F.3d 1157 (9th Cir.1998), in which the Ninth Circuit vacated a state criminal conviction because a critical witness had been given substantial, undisclosed, sentencing benefits for his testimony. In that case the jury received *no* information whatsoever about benefits received by the witness. This case is far removed from such a situation.

The court is not finding that petitioner suffered no prejudice from Masse's perjurious testimony. However, the level of prejudice suffered is insufficient to conclude that a reasonable fact finder would have had doubt about his or her verdict if that fact finder had known "for sure" that Masse believed that he had a twelve year deal. Petitioner's false testimony claim, insofar as it rests upon perjurious testimony about a plea deal must fail.

c. Other Alleged Perjuries

Petitioner also assails Masses' untruths when he testified at petitioner's trial that he had not reviewed "transcripts" or "reports" prior to his testimony. Petitioner now points to the testimony of Investigator Brown that such items were given to Masse to review. However, the trial testimony is much less clear concerning perjury than petitioner's strong statement would have one believe.

> Q. Mr. Masse, you testified that interviews that you had with police officers, and specifically those on May 20th and June 8th of 1983, were tape recorded and transcribed; is that correct?
>
> A. Yes.
>
> Q. And you had occasion to review those transcripts, have you not?
>
> A. Yeah, I believe on one occasion I went through all of them.
>
> Q. Prior to your coming to court in this trial, did you

read any transcripts?
A. I haven't seen any transcripts in a mighty long time on anything.

Exhibit 42 RT. (state trial) at 464.
Questioning continued on this line with Masse remembering that he had reviewed the transcripts sometime either before the DeSantis or Killian trial, but not recollecting when. Investigator Brown's testimony was not laser sharp either as to the precise time he gave transcripts to Masse for his review, i.e., given either before the DeSantis or Killian cases. RT. 218-219. The court fails to find that Masse's testimony was perjurious based on the present record.

Finally, petitioner believes Masse testified falsely about a "disease affecting his memory" at or about the time of the criminal acts. At petitioner's trial, during a heated cross-examination on a non-medical issue, a frustrated counsel asked (argued) the question: "Mr. Masse, are you suffering from some disease that affects your memory." Masse answered "No, I'm not suffering from no disease. You could say burned out." Exhibit 42 RT (state trial) at 409. Clearly, this sarcastic exchange was not an earnest attempt on the part of counsel to query Masse about his medical condition. Petitioner's attempt to assert that Masse's present testimony concerning his medication/drug use or other mental problems ("I was pretty confused and medicated at the time"), RT 228, goes no distance in establishing perjury.

In conclusion, Claim One, based on an assertion that perjury materially underlay the verdict herein, should be denied.[14/]

---

14. Petitioner makes no reference in the post-evidentiary hearing brief that Masse lied at petitioner's trial about the special "conditions of confinement" deals he had received from the prosecution, such as ability to see his family when being taken to the scene of the crime, a steak dinner or

B. Claim Two - The Prosecutions' Failure to Disclose Exculpatory/Impeachment Evidence Violated Petitioner's Constitutional Rights

Much of petitioner's claim herein is a repeat of Claim One, albeit with a different claim attached, i.e., that the failure to disclose the April 1985 re-sentencing letter violated petitioner's Brady/Bagley rights. In addition, petitioner makes further claims that because certain other exculpatory/impeachment evidence was not disclosed, the confidence in the outcome of the verdict should be undermined.

Assuming that Masse's testimony was not perjurious, but only incorrect or incomplete, petitioner's claim that the prosecution failed to correct Masse's testimony is examined under the more lenient standard described in Bagley. Prosecutorial misconduct in withholding exculpatory (including impeaching) evidence amounts to unconstitutional misconduct where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, 105 S. Ct. at 3383; see also United States v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995). In 1995, the Supreme Court clarified the Bagley standard. The Court stated that prosecutorial misconduct in withholding evidence is unconstitutional if the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1566 (1995). The Court also stressed that the test is not one of sufficiency of the evidence. "A defendant need not demonstrate that after

---

two, and the like. The court interprets such silence as petitioner's abandonment of such a contention either because the factual basis for such is unpersuasive, or because petitioner desires to focus on more important untruths. In either event, the court will not discuss it either.

discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Moreover, in the case of multiple withholdings, prejudice is examined on a cumulative basis, not on a document by document analysis in a vacuum. Kyles, 514 U.S. at 436, 115 S. Ct. at 1567. See also United States v. Amlani, 111 F.3d 705, 713 (9th Cir. 1997); United States v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997).

One pre-Bagley case well stated the parameters of impeachment prejudice. Thomas v. Cardwell, 626 F.2d 1375, 1386 n. 34 (9th Cir. 1980). In Cardwell, petitioner raised a claim that his right to confront and cross-examine an adverse witness was denied because important psychiatric evidence concerning the competency of this witness was unknown to petitioner's counsel at trial. The Court of Appeals stated,

> [O]ften information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the opportunity for cross-examination ineffective even though the cross examination itself is less than optimal for the defendant...[T]he test for whether cross examination about a topic was effective is whether the jury is otherwise in possession of sufficient information with which to make a discriminating appraisal of the subject matter at issue...When the matter relates to impeachment evidence, we look to see whether the jury had sufficient information to appraise the bias, motives and credibility of the witness.

Id.

The court now turns to an analysis of the issues.

1. *The April 1985 Re-Sentencing Letter*

In its order requiring an evidentiary hearing, the court did state that the April 1985 letter was one that "surely should have been disclosed." Order at 23. However, that statement was made before the court was informed that the April 1985 letter had been sealed, and not communicated to Masse or his attorney. The facts adduced at the evidentiary hearing have completely changed the court's view on the need to disclose the April 1985 letter.

The court has already detailed the facts surrounding prosecutor Cleland's submission of the sealed April 1985 letter, submitted to the state court, concerning his prospective recommendation that Masse's special circumstances findings be stricken. The court found, after evidentiary hearing, that neither the sealed letter itself, nor the precise information in the letter, had been disclosed to Masse. Finally, because the prospective recommendation could only be material in the Bagley sense if it had been disclosed to Masse or his attorney, i.e., there would be no taint of Masse's testimony without communication of the "re-sentencing offer," the court can find no Bagley error herein for Cleland's non-disclosure of the sealed re-sentencing letter. See generally, Williams v. Calderon, 52 F.3d 1465, 1475 (9th Cir. 1995) (there must be a binding plea agreement in existence before duty to disclose arises).

Again, the court is well aware of the significance of disclosure of a plea bargain in a situation, where as here, the witness who has obtained the plea bargain is the critical witness for the state. See Singh v. Prunty, supra. And, there is no doubt that Masse was the make-or-break witness for the state in petitioner's case. However, upon review, the court emphasizes again that even if a solidified, communicated plea bargain existed, the cross-examination of Masse on his negotiations with the prosecution nullified any Bagley error. The jury heard all the testimony recounted above concerning a deal, and that questioning at trial went even further than the letter in indicating a potential agreement as to a specific length of time,

twelve years, which is far less than would be expected if only special circumstances were stricken as stated in the letter that was not introduced. In other words, the testimony was more potentially impeaching than the letter. The fact that defense counsel was able to identify what Masse now claims was the agreement with the prosecutor (12 years), indicates that defense counsel had access to quite a bit of "deal impeachment" information. Petitioner does not relate how defense counsel was able to identify the purported 12 year agreement in his questioning even though the important impeachment information was allegedly withheld from him. For the reasons given at length in Subsection A above, even applying a de novo review, the court cannot in good conscience find that the non-disclosure of the April 1985 letter undermined its confidence in the outcome of trial.

Because the facts regarding the alleged non-disclosure of the April 1985 letter were briefed for the most part to the state supreme court, and that court denied the petition on its merits, this court cannot find that the state court decision denying relief was an unreasonable application of established Supreme Court authority.

Finally, although the actual innocence discussion is removed from the assessment of potential Bagley error on the jury, the court is comforted in its assessment of prejudice by its determination that petitioner is not innocent of the crimes for which she was convicted.

2. *Other Letters*

Petitioner focuses her argument on three other undisclosed letters which she believes would have materially affected the jury's reception of Masse's testimony if utilized during cross-examination. Two of the letters were written prior to petitioner's trial; one was written afterwards. Those letters involve (1) Masse's statement of concern for his wife's welfare (Exhibit 26); (2) Masse's statement to prosecutor's that they were not honoring his plea agreement (Exhibit 27); (3) the "I lied [my] ass off" letter (written after trial) (Exhibit 46).

In Exhibit 26, dated May 13, 1984, Masse wrote a rambling commentary on his prison conditions where he also expressed his belief that his co-defendant DeSantis was involved in a plot to kill Masse's wife. The court does not find that this letter would have impacted at all on Masse's testimony in petitioner's case. It does not, for example, evince an intention to protect his wife's involvement in the robbery/murder vis-a-vis petitioner. It is simply a normal concern that someone else involved in the case was out to murder his wife.

Exhibit 27, dated June 5, 1984 (but corrected at evidentiary hearing to be 1985-- RT 247-248) demonstrates Masse's change of mind with respect to his prison conditions. Masse was no longer pleased with his accommodations and was worried about his safety. The letter does not involve Masse's testimony except in the tangential sense that he dislikes where he has been housed pending his testimony at trial. This letter does not have impeachment potential; indeed, it cuts against petitioner's other, later argument that Masse was given such favorable prison treatment that the favorable conditions should have been disclosed.

Finally, as referenced earlier, Exhibit 46 written after the trial related Masse's unhappiness with the prosecution's potential repudiation of what Masse believed to be the deal, and also commented on Masse's testimony:

> I been as up front and honest as I could be. I gave you DeSantis and Killian. I did my part all the way to the end. I even lied my ass off on the stand for you people.

First, the letter written after trial does not raise a true Bagley "trial" issue in that it was not available for impeachment purposes because it was not in existence.[15/] However, as

---

15. While the prosecutor may have a continuing duty to disclose exculpatory evidence even after trial, the newly created evidence itself cannot logically relate to a Bagley claim.

referenced at evidentiary hearing during the testimony of petitioner's trial counsel, Ray Thielen, RT 98-99, petitioner claims that the April 21, 1986 letter was received by the prosecution prior to petitioner's sentencing, and that such a letter, including the words that the key prosecution witness "lied his ass off," would have required the granting of a new trial motion made at the time of sentencing. Petitioner's argument has much force to it except for the fact that petitioner was sentenced on April 8, 1986, and there were no pending proceedings in the trial court after that date to the knowledge of the undersigned. Assuming a continuing duty on the part of the prosecution to disclose the letter, it may have been useful in a habeas corpus proceeding. However, that is what *this* court has held. In any event, even assuming that the letter would have been available at some pertinent point in petitioner's proceeding, when viewed in its entirety (including the words that Masse was "up front and honest as I could be when I gave you DeSantis and Killian"), and in light of Masse's present testimony recounted above as well as that of Investigator Brown, the letter raises insufficient Bagley prejudice.[16/]

None of the three "undisclosed" letters presents a meritorious Bagley issue.[17/]

Such evidence may relate to other issues such as ineffective assistance of counsel, or it may be corroborative of a Bagley claim.

16. Brown testified that upon checking with Masse to see what he meant by "lying his ass off," Masse conceded that he had written that just to get Brown (and Cleland's) attention.

17. Petitioner referenced additional undisclosed documents in her petition, but omits any argument concerning those in the post-evidentiary hearing brief. See Masse letter to Judge DeCristoforo, Exh. AAA:1-2 (petition exhibit) and Joseph Masse declaration regarding Masse's deal with the prosecution. Those documents, however, are cumulative for the

3. *Masse's Previous False Accusations as a Confidential Informant*

This category of undisclosed information was not addressed at the evidentiary hearing. AEDPA deference is involved for this claim. The court simply reiterates its discussion of this category set forth in the evidentiary hearing order.

This third category concerns evidence of Masse's history as a confidential informant, in which he allegedly made false accusations in another case in 1980. In a letter from defense attorney Ronald Castro, to the District Attorney, Castro describes his defense of Wayne and Joyce Lumpkins who were arrested based on the information of a Gary "Massi." Exh. E to Petition. His clients claimed they were set up by Masse, who bragged to an individual that he had committed the crime for which the Lumpkins were arrested. The charges against the Lumpkins were later dismissed because Masse refused to testify about his involvement. Attorney Castro then talked to the drug store owner who had been robbed. He stated that all of the culprits had been caught except one, whose description matched Masse's. The drug store owner was prevented from seeing a line-up including Masse because Masse was protected by the "H.I.P." and no line-up was permitted. This letter was not disclosed to the defense prior to trial. Exh. UU to Petition.

Petitioner is somewhat unrealistic in presuming that this letter sent to the District Attorney in 1980, as a complaint from one attorney on behalf of clients totally unrelated to the robbery/killing here, should have been known by every attorney in the office of the Sacramento District Attorney. But even tasking the actual prosecutor here (Cleland) with knowledge of one of probably thousands of letters received by the District Attorney's office not specifically addressed to him, respondent is correct that the multiple layers of hearsay in the letter were

---

most part to the points made by petitioner herein and will not be discussed by the court.

not sufficiently probative such that the letter should have been disclosed. If the information had been in the form of a record, where Masse had been adjudged to have been an unreliable, indeed perjurious, informer, there is no doubt that the information would have been probative. But cast in the form of hearsay allegations, a reasonable defense attorney would not have spent much time in trying to construct impeachment on a collateral matter. It is highly doubtful that the Killian trial judge would have permitted a trial within a trial to assess the bona fides of the Lumpkin case based on accusatory hearsay alone. See, e.g., People v. Douglas, 50 Cal. 3d 468, 509, 268 Cal. Rptr. 126, 147 (1990) ("We have consistently held that it is within a trial court's discretion to exclude collateral evidence offered for impeachment purposes..."); United States v. Miller, 159 F.3d 1106, 1112 (7th Cir. 1998). And, there surely would have been need for such a factual determination given the type of persons associated with Masse in the first place. Given that the information alleged here goes not to the actual innocence of Killian, but rather to a matter of impeachment and credibility of a trial witness on a collateral matter, this habeas court will not perform an exercise to determine the truth of the Lumpkin case, and pretend that the trial court would have permitted such as well. In addition, petitioner has not brought forth a scintilla of extra evidence aside from the letter with which to judge the matter.

No evidentiary hearing was held on this issue, the state supreme court decision denying this claim is entitled to deference, and the court recommends that judgment be awarded to respondent on this sub-claim.

4. *Masse's History of Mental Illness and Drug Addiction*

This category of evidence, regarding Masse's mental illness and drug addiction, consists of various items of which petitioner claims the prosecution was aware. They include: a report by Detective Biondi, dated December 16, 1981, wherein Masse told Biondi that he had a nervous condition which

needed special medication from his doctor, and Masse admitted that he had numerous emotional problems, Exh. II to Petition; a Sacramento Sheriff's Department report which contained a statement by Masse's physician that Masse had tried to commit suicide and suffered from a chronic severe personality disorder, Exh. FFF to Petition; Sutter Hospital medical records, see Exhs. DDD, EEE, W:9-26 to Petition; various psychiatric records describing impaired recent memories, hallucinations, depression, schizophrenia, semi-delusional state, pre-psychotic disposition, chronic drug abuse, recommendation that Masse be institutionalized, and suicidal tendencies, Exh. F to Petition; Declaration by Masse's attorney stating that Masse's physician found Masse incapable of testifying, Exh. G to Petition; Masse's testimony at petitioner's trial in which he declared that he was not suffering from any disease, Exhibit 42 RT [state trial] at 409.

In the court's evidentiary hearing order, the court pointed out that petitioner could not proceed on this claim as a Bagley issue, and at the same time proceed with these facts on an ineffective assistance of counsel claim because the premises of the claims were inconsistent. That is, the Bagley claim depended upon a finding that the information was not disclosed *and* that petitioner's trial counsel could not have discovered the evidence utilizing due diligence. See United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991). On the other hand, the ineffective assistance claim depended upon the finding that counsel could have ferreted out the information exercising due diligence. Petitioner was admonished that she could not continue to proceed on an inconsistent basis—either her counsel could not have discovered the evidence utilizing due diligence (thus presenting the issue as a Bagley claim), or that her counsel could have discovered the information, but did not do so because of incompetence (thus presenting the issue as an ineffective assistance issue). Petitioner was told to make a choice.

From a review of the petitioner's post-evidentiary hearing brief, counsel has evidently conceded that Masse's medical records are not a Bagley non-disclosure problem, and has made the choice to proceed on this issue as an ineffective assistance problem. The court will reserve further discussion for that section.

5. *Medical Evidence Concerning Grace Davies' Memory*

The next category of undisclosed evidence concerns medical information to impeach the reliability of victim Grace Davies' memory about the crime.[18] A letter by Dr. McKennan, an expert for the prosecution, written to the prosecutor prior to petitioner's trial, indicates that certain drugs given to Mrs. Davies prior to her operation could have altered her memory and may have affected her report to the police, depending on when they questioned her. Further, this doctor noted that the medical reports do not indicate that any bullet fragments were removed. Exh. RRR to Petition. Petitioner argues that the bullet fragments and drugs could have affected her memory. Exh. TTT to Petition. No one can reasonably contest the fact that the letter should have been disclosed.

Respondent argues that this evidence is not exculpatory in that Mrs. Davies did not identify petitioner at either a line-up or at trial as the one who came to the door one or two weeks before the crime. For this reason, the jury did not convict petitioner on the overt act of that prior encounter. Further, Mrs. Davies did eliminate JoAnn Masse as the woman

---

18. Mrs. Davies testified that petitioner resembled a woman who had knocked on her door two weeks prior to the crime. Masse's testimony corroborated that petitioner was the one who had knocked on the Davies' door that time, accompanied by Masse and DeSantis in a first robbery attempt. Petitioner argues that without these two unreliable witnesses, petitioner may not have been convicted, and that it was actually Masse's wife, JoAnn Masse, who had knocked on the door.

who came to her door.

Although Mrs. Davies' testimony did not *directly* implicate petitioner, it was important in declining to implicate JoAnn Masse as the woman who came to her door one or two weeks before the crime. Moreover, she testified that the woman who came to the door "resembled" petitioner. Respondent's position begs the issue—was the failure to recognize a (probably disguised) woman and the ability to recall "resemblance" a result of faulty memory. If Mrs. Davies' memory had not been failing, then it is possible she might have definitively identified JoAnn Masse, and this fact may have affected the jury's review of the case. Further relating to the unreliability of both Masse and Mrs. Davies' memories is the testimony of DeSantis at his trial—that Masse told him it was Masse's wife who went to the Davies' door two weeks prior to the crime. Exh. W:36-38, 147.

In the evidentiary hearing order, the court emphasized, however, that petitioner bore the burden of proving prejudice, and expert testimony would be necessary to meet that burden. While petitioner did call an expert at evidentiary hearing with respect to the effect of medications/drugs on Gary Masse's memory, the witness was asked no questions about Grace Davies. Nor was another witness produced that spoke to the Davies' issues. The court is thus left only to the imprecise opinion set forth in the letter—that Grace Davies' memory "could have" affected her memory of certain events. Given the Bagley standard—that the court's confidence in the outcome must be shaken—such impreciseness is insufficient for the grant of habeas relief. The undisclosed letter about Mrs. Davies' memory is not actionable.

6. *Evidence Implicating People Other Than Petitioner*

The next to last category of evidence which petitioner claims the prosecution withheld is that which implicates two other people and exonerates petitioner.[19/] These two people,

---

19. Respondent points out that this category of

Virgil Fletcher and Robert Hord,[20] knew Gary Masse, and had possessed the information that the victim kept large amounts of valuables at his house. Both individuals also received proceeds from the robbery.

a. Evidence Implicating Virgil Fletcher

Petitioner asserts the following. Masse had told police that he knew a Virgil from the coin shop, and had heard that he would buy valuables without asking questions. Exh. 19 at 7-8 (GG:7-8 Petition). Police were also told that Virgil Fletcher confided to Charles Duncan, his partner at Allied Coin, that he had some of the Davies' property from the robbery in three different locations. Exh. N (Petition). Duncan also knew that Fletcher was selling "stuff" to a coin company after the Davies robbery. Exh. P:1 (Petition). Additionally, Duncan recalled to police that Fletcher had seemed interested in sales Duncan had made to Ed Davies. Exh. O (Petition).

Another individual, Willie Weiland, told police that Fletcher had told him that Davies had buried money in his backyard. Exh. R:4 (Petition). Weiland also identified another woman, "Marge," who he had previously thought was the "Gloria" involved in the crime, based on seeing her at Fletcher's home. RT (state transcript) 633.

Other evidence indicates that Fletcher's girlfriend, Denise Scaletta, tried to sell to a coin shop under suspicious circumstances weeks after the robbery. Exh. V:115-122 (Petition). Masse also testified that Fletcher was keeping some of Davies' gold in a safe at Allied Coin. Exh. V:34 (Petition). Masse testified that he had been in Fletcher's coin shop more than once and had tried to sell Fletcher a bracelet. Id. at 48-49. Fletcher also told police that he had given Davies advice on

---

information was disclosed as discovery to co-defendant DeSantis, and since petitioner was not severed from DeSantis until November, 1984, she most likely received the information.

20. Hord was Neva Snyder's son. RT 430.

building safes in his garage to hold his valuables. Exhs. HHH, V:123-25. Finally, Fletcher's polygraph test resulted in some untruthful responses. Exh. III.

Petitioner argues that based on the above evidence, Fletcher's testimony was not neutral or truthful when it implicated petitioner, i.e., he had a reason to give false testimony. (Fletcher had reported petitioner's reaction to hearing about the robbery/killing on TV news.) The purpose of the evidentiary hearing was to determine whether the aforementioned "withheld" information, based on police reports and interviews, should have been disclosed by the prosecution. However, at the evidentiary hearing, and in connection with Fletcher, habeas counsel did not ask Thielen any questions about the exhibits referenced above, i.e., whether such exhibits had been disclosed to him. Petitioner has not met her Bagley burden in demonstrating that her trial counsel did not have access to the above information, or that the prosecutor withheld such information.

b. Evidence Implicating Robert Hord

Other evidence not disclosed to the defense, according to petitioner, was that before the Davies robbery, Hord solicited a Gary and Geraldine Smith to participate in it. Exhs. 14 (J- [Petition]), 13 (K), 15 (L), 16 (M). Gary Smith told police that Hord asked him to build a silencer for a .22 pistol. Mrs. Smith ended up declining to participate in the robbery; however, Gary Smith did build the silencer for Hord. Exh. 16 at 6 (M). At a police interview, both Gary and JoAnn Masse admitted that Bob Hord had given them the silencer associated with the crime. Exhs. 18 (JJJ), 20 (KKK). Gary Smith also stated that Hord obtained coins from the crime proceeds, but was very upset that some of the proof sets had been opened, which had lessened their value. Exh.13 at 2 (K:2); see also Exh.15 at 1 (L:1).

Further, Hord and Masse had known each other since they were teenagers, and Hord had solicited Masse for crimes in the past. Exh. V [Petition]:46-47, 53, 57, 64, 66. This

evidence also discredits the prosecution theory that Killian had to be the intermediary between Masse and Fletcher. Moreover, petitioner argues that Hord had solicited Gary and JoAnn Masse to commit a similar robbery about a month before the Davies robbery, which was carried out in a similar fashion, with a woman knocking at the door to gain entry. Exh. V:55-57, 108-111. Finally, petitioner argues that Masse testified that Hord had driven a backup car to the first aborted Davies robbery. Exh. V:44.

The above evidence, if true, would tend to distance petitioner from the planning of the robbery, and would obviously implicate Hord. Thus, it would have been important that such information be disclosed to petitioner's trial counsel so that he could at least investigate the possibility of producing admissible evidence demonstrating Hord's involvement.

The only exhibits referenced to Thielen by question at the evidentiary hearing with respect to whether he had received them in discovery were Exhibits 13, 14, 15 and 16. Thielen did recall having received Exhibits 13, possibly 14, and 16. Clearly, there is not a legitimate Bagley issue with respect to these three exhibits. Thielen could not recall having received Exhibit 15– "I don't have a specific recollection of having seen this document." However, given the passage of time, the court cannot find that this equivocal answer indicates that the Exhibit was not transmitted in discovery, or that the prosecutor withheld it. Petitioner's Bagley claim must fail.

7. *Evidence of Special Favors Given to Gary Masse Pending Testimony at Petitioner's Trial*

Petitioner refers to "special favors" given to Masse during those times he was assisting the prosecution in its pretrial investigation of petitioner's case. Those favors included eating in public restaurants when out of jail and in the custody of Investigator Brown, and also Masse's brief visits with his family during those same excursions. RT 269. The court finds that Masse was given such treatment while he was awaiting his testimony prior to petitioner's case. See RT 217-

218. However, the treatment was infrequent. Petitioner claims that this evidence should have been disclosed because it confirmed in Masse's mind the existence of a 12 year deal. RT 105, 280; Post-Evidentiary Hearing Brief at 8. The court has already stated its opinion on the improbability of a straight 12 year deal, but assuming that petitioner means any deal, the argument is not well taken.

Petitioner does not claim that the favorable treatment described here, assuming it rises past a de minimus threshhold, is treatment that in itself would affect Masse's testimony. Rather, petitioner would task the prosecution with clairvoyance duties, i.e., to disclose evidence that might confirm what one of its informant witnesses believed in his own mind. No specific authority is cited for such a proposition, and the court is aware of none.

Even if there were some duty to ascertain what might be confirmatory of a deal in the mind of a witness, or even if the treatment is viewed as potentially tainting treatment on its own account, the court cannot find that the evidence in this case rises to the level of Brady/Bagley evidence. In order for a duty to disclose evidence absent request to arise, the exculpatory or impeaching evidence must be (1) favorable to the accused; (2) purposefully or inadvertently not disclosed by the prosecution or agencies working on its behalf; and (3) prejudice must have ensued. Strickler v. Greene, __U.S.__, 119 S. Ct. 1936, 1948 (1999). As discussed previously, that prejudice is of a type that the court's confidence in the legitimacy of the outcome of the case is undermined. Examples of such prejudice are failure to disclose the communicated plea agreement of a critical witness (Bagley); the suppression of statements of a material witness at odds with trial testimony (but see Strickler where such suppression still failed to establish the requisite prejudice). Petitioner's evidence of special treatment pales in comparison to that potential for prejudice found sufficient by the Supreme Court. The writ of habeas corpus cannot be granted based on the failure to disclose special favors to Masse.

C. Claim Three – Denial of Due Process Due to Doyle Error

Police took petitioner in for questioning about the crime on December 16, 1981. After waiving her *Miranda* rights, petitioner spoke to police for about two hours. During this time, police formally arrested petitioner. She immediately invoked her right to counsel before answering any other questions. On direct examination, petitioner's counsel questioned petitioner about her "voluntary" decision to talk to the police, and her decision to cease the interrogation. The prosecutor on cross-examination focused on this decision to stop talking, both in his cross-examination of petitioner and his closing argument. For the reasons that follow, petitioner's "opening the door" to the prosecution's questions precludes a claim of Doyle error. This is true either under a de novo review standard or AEDPA deference.

On cross-examination of petitioner, the prosecutor repeatedly asked petitioner about her invocation of her right to remain silent.

> Q. And when you talked to them you had nothing to hide; did you?
> A. No.
> Q. And when they arrested you was there some reason why you decided that you had told them enough?
> A. Yes.
> Q. What?
> A. A person who has been arrested should never speak to anyone without the presence of an attorney.
> Q. What did you have to hide?
> A. I had nothing to hide.
> Q. Why did you stop talking to them?
> A. Because that is good sound legal advice.

RT 981-82.

The next question was objected to, and the objection was sustained. The questioning continued later:

> Q. Now do you have something to hide when you told the officers you didn't want to talk to them any more?
> A. No.
> Q. Wasn't it a fact that because Virgil Fletcher had not been arrested you figured you could have done the same thing, and when you couldn't talk your way past them you decided not to say anymore? Isn't that what happened?
> A. I refused to talk to them anymore because they had placed me under arrest. It was obvious that they didn't –
> Q. Didn't you feel like, hey, wait a minute, I can explain this?
> A. There is no point to continue to talk after you have been arrested.
> Q. How do you know that?
> A. From law school.
> Q. You learned that in law school?
> A. That is the first piece of advice you learn in criminal law. It is best to have an attorney present.
> Q. Uh-huh. Well, why didn't you – my question remains though, if you had nothing to hide, why didn't you explain to the officers further, try and explain to them further so that they could understand that you had nothing to do with this crime?

RT 995-996.

This last question was objected to and counsel went to a sidebar at which time the trial judge expressed his concern with questioning the witness about her invocation of her Fifth Amendment rights. The conversation out of the jury's presence was as follows:

> THE COURT: ... Kit, I just have some concern about pressing – I just remember some case that said that if someone wants to avail themselves of their right not to, say, testify or raise the Fifth Amendment, that to do so is not to be used to presume that they are hiding something.
> MR. CLELAND: I understand that. The way it has been developed by them I feel there is some redress.
> THE COURT: I think you are treading on very dangerous ground and you could end up with a real problem.
> MR. CLELAND: I understand.
> THE COURT: I thought it was just best to mention it before we got any deeper.
> MR. CLELAND: You are right. It could be a problem area, but I think even with those cases in mind, they brought it up themselves and it is a very important point of the robbery.
> THE COURT: Then you are getting into argument.

RT 996-97.

The prosecutor thereafter dropped the line of questioning

On its face, and standing alone, the foregoing recitation demonstrates that after invocation of her Miranda rights, this use of petitioner's "post-arrest silence" by the prosecutor violated the holding in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976), and constituted fairly egregious Doyle error at that. Put succinctly by the Ninth Circuit, "[s]ince a defendant who is given this [Miranda] warning is implicitly being told that no penalty will be imposed against him for choosing to exercise the right to remain silent, the Fourteenth Amendment Due Process Clause has thus been interpreted to prohibit the use of a defendant's post-warning silence for impeachment purposes." United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999). See also, United States v.

Negrete-Gonzales, 966 F.2d 1277, 1280-81 (9th Cir. 1992). Questions which focus only on pre-Miranda warning silence do not violate Doyle. Fletcher v. Weir, 455 U.S. 603 (1982).

However, common sense exceptions to the Doyle rule have sprung up in Doyle's aftermath. Obviously, if one waives his or her Miranda rights, and does not subsequently re-invoke them, comment may be made about the defendant's untrue, or evasive answers. United States v. Pino- Noriega, supra. Closer to the point of this case is the holding of Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124 (1980), in which a testifying defendant could be impeached by his pre-warning silence if he took the witness stand. Closest to the issue here is McMillan v. Gomez, 19 F.3d 465 (9th Cir. 1994). In this case a Doyle exception was recognized even for cases where the attacked silence occurred after Miranda warnings when the defendant testified at trial to his previous cooperation with the police as a plus to his credibility. Id. at 469-470. That, is indeed, what happened here.

On direct examination, Thielen attempted to portray his client in a "cooperative" light for the purpose of demonstrating to the jury that she had nothing to hide at the time of her arrest. He first established that she knew why the police officers had come to question her, and they asked her, "Did you voluntarily go downtown with the officers" RT [state trial] at 961; "Did you voluntarily take your purse with you [the purse with arguably incriminating evidence in it]" Id. Thereafter Thielen established that petitioner voluntarily discussed the substance of the case with the police for a lengthy time after she had received and understood her Miranda rights. RT [state trial] at 963. Thielen even questioned his client about why she stopped talking to the police—she had been arrested. Id.

At this point, petitioner having attempted to enhance her credibility with her cooperation, the prosecutor was permitted to test petitioner's credibility as to "the real" reason why she stopped talking—she realized that she had inculpated herself, and it was time for damage control. And, while

petitioner's responses to the prosecutor's questions as to her belief that it was time to acquire a lawyer and be silent when she had been formally arrested may well have been sensible and true, the prosecutor was entitled to test this very issue that petitioner had voluntarily injected into the case. The issue of petitioner's credibility on her stated reasons for terminating interrogation was an issue for the jury.

Given the clear holding of McMillan v. Gomez, the court cannot find Doyle error on this record. Moreover, petitioner has not demonstrated that the state supreme court decision on the merits regarding the Doyle issue runs afoul of established Supreme Court authority. Indeed, the undersigned is unaware of any Supreme Court authority on point to a situation where a person claiming Doyle error testified at trial on direct examination to her cooperation with the police prior to her refusal to testify further.

D. Claim Four - Ineffective Assistance of Counsel Due to Deficient Investigation and Performance at Trial

Petitioner claims the following investigative failures by her trial attorney: (1) failure to investigate Masse's mental health history; (2) failure to investigate and show that Masse's statements to police were false; and (3) failure to investigate the theory that Fletcher or Hord solicited Masse, in order to exculpate petitioner. Petitioner also claims ineffective assistance at trial by the following errors: (1) failure to present evidence to discredit Masse's testimony, (2) failure to impeach Mrs. Davies, (3) failure to impeach Virgil Fletcher, and (4) failure to object to prosecutor's questions regarding petitioner's exercise of her right to remain silent.

The United States Supreme Court has described the standards this court must apply to an ineffective assistance of counsel claim. Lockhart v. Fretwell, 506 U.S. 364,113 S. Ct. 838 (1993). Previously, the test for demonstrating ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), and this test survives.

First, a petitioner must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S. Ct. at 2064. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690. The federal court must then determine whether in light of all the circumstances the identified acts or omissions were outside the wide range of professional competent assistance. Id. "We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland at 689).

Second, a petitioner must affirmatively prove prejudice. Strickland 466 U.S. at 693, 104 S. Ct. at 2066. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2067. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

In Fretwell, however, the Supreme Court has emphasized other language from Strickland to further define what is necessary for a petitioner to prove the prejudice prong of his ineffective assistance of counsel claim, almost adding what appears to be a third prong to the analysis. The Fretwell Court held that prejudice concerns not only whether the outcome would have been different but for counsel's errors, but more importantly evaluates whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness.

Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle

him. Lockhart v. Fretwell, 506 U.S. at 368,113 S. Ct. at 842. Therefore, if the court finds that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's unprofessional errors, the result of the proceeding would have been different, the court must then ask, whether despite the errors and prejudice, was the trial fundamentally unfair or unreliable.

1. *Claim of Failure to Investigate Masse's Mental Health History*

Petitioner first claims that her trial attorney failed to join in DeSantis' motion for disclosure of Masse's medical records to determine if Masse was competent to testify. Her attorney also failed to make an independent request for discovery despite being on notice of Masse's mental problems and the existence of mental health records, and despite the prosecution's failure to independently disclose them. Because Masse was the most significant witness implicating petitioner in the crime, petitioner argues that his impeachment on this basis was crucial to her exoneration.

Respondent argues that, despite the mental records, petitioner has not shown that Masse's ability to accurately relate events was affected.

The following summary of records describes information which was apparently available to petitioner's defense counsel prior to trial.

a. Preliminary Hearing Testimony

In support of her position, petitioner cites to portions of the preliminary hearing transcript in which Masse's testimony reflects his mental confusion. Exh. PP:11, 20, 25.[21/]

During his testimony at the preliminary hearing, Masse stated that his mind was "fogged up" from answering questions all day. Exh. PP:11. After further questioning, Masse responded:

---

21. All of the lettered exhibits were attached to the petition.

> A At this time I don't – I can't – you got my head spinning like a top. I can't even think too clear. You know, it's – going to have to get me a break, so I can clear my mind or –

Exh. PP:20.

Later during the same hearing, Masse stated that during the discussions between him and petitioner, he was taking Valium, but did not have any problem perceiving what was happening. Id. at 25.

b. Summary of Masse's Mental Health Reports Available to Defense Counsel

The police reports which were apparently available to trial counsel noted the following.[22/] A mental status examination dated December, 1981, indicated that Masse had marked depression, and marked de-realization or de-personalization. Exh. F:1. In a Jail Psychiatric Services report, dated December 21, 1981, Masse related that he had been schizophrenic since 1975. Exh. F:2. On July 27, 1982, the mental health practitioner noted no evidence of depression. On September 20, 1982, it was noted that Masse's behavior was stable and that he refused mental health services. Exh. F:3. A Sutter Hospital discharge summary, dated February 2, 1979, diagnosed Masse with schizophrenic reaction, schizoaffective type. Exh. F:4. A neurological workup was negative; however, Masse was noted to have a "deeply disturbing set of delusions,

---

22. Petitioner claims that while she was joined with DeSantis as co-defendants, DeSantis' attorney moved for disclosure of Masse's mental health records and a hearing was held to determine if Masse was competent to testify. Petitioner's trial counsel did not join in the motion, even though he was present at the hearing. Thus, petitioner argues that although the prosecution improperly failed to disclose Masse's mental records, petitioner's attorney should have discovered them through an adequate investigation.

somatic in nature, with burning and unrest and a great deal of restlessness and tension. He is also more depressed lately." Id.

On August 27, 1980, Masse's problems included severe anxiety, clouded thinking and delusions. At this time, Masse was "heading into an incipient psychosis." Exh. F:6. Masse was admitted to the emergency room in 1973 for attempting to kill his wife and children. He was diagnosed with schizophrenia, paranoid type. Exh. F:7, 10. A separate report from the same hospital visit in 1973 declined to diagnose Masse with schizophrenia. Id. at 8. A September 22, 1975, report diagnosed Masse with paranoid schizophrenia, and was delusional and psychotic at times. Id. at 11. There are numerous additional reports in the mid to late 1970's which refer to Masse's psychotic state, schizophrenia, depression, and drug addiction. Exh. F:12-16, 22-23. One report stated that Masse should be institutionalized. Id. at 15.

c. Police Reports Available to Defense Counsel

Petitioner further argues that police reports available to the attorney indicated that Masse was under the care of a physician, and his discussions about mental treatment. Exhs. F, II, PP.

On December 16, 1981, a police detective tape recorded a telephone conversation with Masse in which Masse responded to the officer's advice to surrender by stating that "those guys are out to kill me and if they catch up with me they will kill me." Exh. II:1. Masse also told the detective that he had suffered emotional problems for years, and needed medication from his doctor before he could come in and talk to the police. Id. at 2.

d. Evidence at Evidentiary Hearing

Petitioner called Dr. Mills, a well-qualified forensic psychiatrist, to opine whether Masse suffered from a mental deficiency that encouraged a motivation to fabricate, and also on the effect that ingestion of certain drugs, most notably valium, had on Gary Masse's ability to remember or perceive events. With respect to the former issue, Dr. Mills was only

able to offer an opinion that Masse's history of mental problems "could have" affected his ability or motivation to fictionalize or misrepresent." RT 27. Dr. Mills expressly informed the court in his testimony that "would have" affected was too strong an opinion. Id. Dr. Mills was somewhat handicapped in not having been able to examine Masse, but he finally related his inability to form a "probability" opinion:

> I cannot really opine about [his motivation] in terms of his schizophrenia. Clearly, he has some delusions. Clearly, he was hallucinating a lot at various points (1973-1982); but as your question implied earlier, those symptoms waxed and waned.
>
> We don't have a good enough chronology to know how intensely they waxed and waned, number one; and there is no very detailed recounting of what his delusions were like, number two, that would allow me to say, "Oh, yes, those delusions are classic of somebody who would tell a tale, because he was worried about being part of the CIA," or "No, delusions are really so different that I don't think they would affect his testimony at all." I just can't say, because I don't know enough.

RT 41.

***

> And there's no clear record in this case that allows me to say that his symptoms were so overwhelming that he clearly couldn't remember very much, or his symptoms were so much, or his symptoms were so much under control that it's highly unlikely that he had any problem or any– that it affected his memory at all.

RT 44.

With respect to the drug ingestion and impairment of memory, Dr. Mills again stated in no uncertain terms that such drug use "could have" affected memory while the person was under the influence of the drug, RT 51-52. But no evidence, except for Masse's latter day declarations that he was abusing drugs "a lot" at or about the pertinent time periods was introduced to determine precisely when in relation to petitioner's involvement in the case Masse had ingested drugs, or the degree to which he was intoxicated at the pertinent times.

e. Discussion

Mr. Thielen was asked at evidentiary hearing whether he "should have pursued the issue of trying to get Mr. Masse's medical records to find out if there was more information there that would have enabled [him] to assess his credibility with the assistance of an expert." RT 112. Thielen answered yes. Thielen also answered that he did not have a tactical reason for not looking into the medical issues of Masse's credibility. RT 111. The court does not share counsel's latter day adverse opinion of his reasonableness in pursuing credibility issues related to Masse.

First, it is obvious from the state record of Masse's cross-examination, some of which has been set forth above, that Thielen's strategy was to persuade the jury that Masse was intentionally making up Killian's involvement to acquire some type of deal from the prosecution. "If I were able to firmly establish that he [Masse] was deliberately lying, then I probably would have foregone the mental issue." RT 192 (Thielen). Also, as discussed above, counsel had enough information concerning the only logical deal that he was able to ask Masse if he was getting a "12 year deal." Counsel attempted to bore holes in Masses' recitation of the facts to show that Masse was purposefully fictionalizing events. Adding a defective memory component to this strategy, while potentially of some benefit, would not have added much to the impeachment strategy. In sum, what would have made a difference to the jury is a belief that Masse was intentionally confabulating his testimony at trial

in order to get a deal. How that confabulation came about, either through purposeful fiction, or an insincere attempt to fill in memory gaps caused by mental disease or drug addiction, was not of overriding importance. The end strategy was the same—show that Masse was making up petitioner's involvement to acquire a benefit. Indeed, introduction of a memory defect, impeachment strategy which would contain forgiving overtones of "Masse could not help the fact that he had a poor memory" may well have taken away from a strategy that Masse was purposefully pursuing a selfish goal of saving himself no matter who he had to destroy in the process. The jury may well have been diverted from the overall impeachment goal by attack and counter-attack on medical issues. The court would not find a tactic of foregoing a medical attack on Masse's credibility as unforgivable strategy.

However, even more important to the outcome of this claim is that petitioner cannot demonstrate prejudice even assuming counsel should have advanced a medical attack. The best Dr. Mills could do was opine to a "could have" potential effect. He could not pin down the state of Masse's mental problems at the relevant times surrounding the robbery/murder so as to offer any definite opinion concerning the impact such problems "would have" on Masse's memory. Nor could he opine with any certainty whether Masse's memory was clouded by drug use during all relevant periods of time because he only had general statements of drug use with which to assess the matter. The doctor did not state that one's ability to recollect facts would be equally impaired no matter the degree of drug intoxication or after-intoxication sequellae. Without some precise anecdotal evidence concerning Masse's drug use at the time he became acquainted with petitioner, the court would be entirely speculating that Masse had probable memory gaps concerning who was involved in initiating the Davies' robbery which he then filled with a made-up version of events which included petitioner. Moreover, petitioner is being inconsistent in her argument concerning Masse's memory—she does not

claim that Masse was confabulating his belief that petitioner was cast aside by the main actors in the robbery/murder after the initial attempt(s) at performing the robbery proved futile. Petitioner cannot pick and choose when Masse was fictionalizing events based on whether it helps or hurts petitioner's case.

For these reasons, petitioner's claim that counsel was ineffective for failing to pursue a medical attack on Masse's memory abilities must fail.

2. Claim of Failure to Investigate and Show that Masse's Statements to Police Were False

The statements to which petitioner refers were related in Masse's interview with police on May 20, 1983, in which he stated to police that Robert Hord beat up petitioner. Petitioner claims that she was never physically beaten by Hord, and had never even met Hord until after Masse was arrested in this case. She claims that her attorney should have investigated these statements, as well as Masse's claim that after the crime he went to petitioner's house. An investigation would have shown that petitioner did not have a house at that time, but resided in an apartment with her boyfriend over the garage. According to petitioner, these lies by Masse could have been used to impeach him.

Respondent correctly argues that these matters were so tangential to the prosecution's case that they could not have possibly affected the jury's verdict either singularly, or in conjunction with other prejudice.

3. Claim of Failure to Investigate Theory that Fletcher or Hord Solicited Masse, in Order to Exculpate Petitioner

Petitioner argues that the same defense theories which were presented in Claim II are grounds for ineffective assistance here, provided the information regarding Hord and Fletcher was disclosed to defense counsel. That information includes evidence that both men knew Mr. Davies kept valuables at his home, both obtained proceeds from the robbery, both men knew

Masse, and that Hord had attempted to solicit another couple to commit the robbery.

The court previously found in Claim II that petitioner did not show that the allegedly impeaching information was unavailable to her counsel. Assuming that the information detailed in Claim II was available, the court finds that reasonable counsel would not have muddied the defense with this information. The court repeats its previous conclusion with respect to Fletcher that having other people involved in the Davies' robbery/murder along with petitioner does not exonerate petitioner from any conspiracy linked to the actual robbery/murder. What good would it have done to vaguely implicate Fletcher via impeachment in the actual solicitation of Masse, who was then, or at a later time, petitioner's live-in girl friend, Exhibit 43: 564? Petitioner's defense was that she did not even know Masse (or any of the other participants in the Davies' robbery/murder). Petitioner's defense would have suffered if she were to be closely linked to the robbery/murder participants by virtue of her relationship with Fletcher. Although the thrust of the impeaching evidence demonstrates that Fletcher potentially benefitted from the robbery/murder, none of the alleged impeachment directly indicated that Fletcher was involved in the planning stages. At best, even after the impeachment, petitioner remains in the picture. It would hardly have been wise to attempt to destroy Fletcher's credibility with insinuations that he was involved in the crime.

The Hord evidence is a closer question, and the court heard testimony at evidentiary hearing concerning Hord's involvement. To summarize the evidence given in Claim II above, evidence existed from police interviews that Hord (son of Neva Snyder) had actually solicited Gary Smith and his wife (Jerry or Geri) to become involved in the Davies' robbery/murder. Jerry (Geri) Smith declined as did Gary Smith. Hord had related to Smith quite a bit of specific knowledge about the Davies and their storage of coins at their home. Also, the planned modus operandi of the robbery had many

similarities to what Masse testified had been originally planned for the Davies' robbery, e.g., use of a woman to effectuate an entry to the home. Moreover, Gary Smith did make a silencer for Hord, and this silencer was arguably connected to the events leading up to the Davies' murder. See Exhibit 13, 16. Hord did indicate that others were involved, and at one point, "Horde [sic] said he was afraid that they might be doing it [the robbery] ahead of time or something." Exhibit 16 at 2. "[Smith] got the impression that Horde [sic] was afraid someone was going to to [sic] the job without him." Id.

Smith corroborated the substance of these statements at evidentiary hearing. The court found him to be a credible witness based on his demeanor, and especially, based upon Smith's desire to go forward with his testimony even after being apprised that there was some possibility that he could incriminate himself. RT 335. Smith did not appear to be evasive, nor did he seem to have any underlying motive to testify in petitioner's favor. [23/]

---

23. The court has reviewed Hord's testimony in the DeSantis trial. The court obtained a copy of the DeSantis state record of Hord's testimony in that the parallel DeSantis habeas petition is proceeding in the Eastern District. This court may take judicial notice of its own records. Hord did indeed deny involvement in the Davies' robbery/murder and repudiated any of the statements he allegedly made to Smith. RT (DeSantis state trial) at 8965-8967. Hord did concede that he talked to Smith about construction of a silencer for a .22 caliber weapon, but it was more in the vein of an "academic" or "how to" discussion. Hord testified that he barely knew petitioner from an introduction by his mother (Neva Snyder). RT (DeSantis trial) at 8981. Hord did deny that petitioner ever approached him about getting her share of the robbery proceeds. RT (DeSantis) trial at 8995. Hord did invoke the Fifth Amendment when it came to questions about his acquisition of part of the Davies' robbery proceeds. RT (De Santis trial) at 8983, 8988.

Thielen testified that he did not have a tactical reason for not attempting to utilize Smith's testimony at petitioner's trial. RT 122. The purposes of such use would be to impeach Masse, and directly demonstrate "the planner" of the Davies' robbery as someone other than petitioner.

The court cannot ascribe a good reason why Thielen did not attempt to utilize Smith for the purposes just stated. Surely, there were evidentiary problems to overcome as Hord's admissions were not the admissions of a party (unless Hord is viewed as a co-conspirator). And, the prosecution would have undoubtedly called Hord to repeat his denials if necessary. Nevertheless, there was not much downside and potentially a modest upside to calling Smith.

The question to be answered is whether the court's confidence in the outcome of petitioner's conviction is undermined by Smith's testimony. The court does not find sufficient prejudice. Key to the court's finding is that Hord himself, if Smith is to be credited, indicated that others (possibly including petitioner) were involved. Hord was part of a larger, or even parallel, conspiracy. Such a fact does not establish that petitioner was not part of that same or "other" conspiracy. The fact that Hord did not specifically mention who the other persons involved were is not exonerating or surprising.

4. Claim of Failure to Present Evidence to Discredit Masse's Testimony (Snyder and DeSantis)

Petitioner argues that at the DeSantis trial, both DeSantis and Neva Snyder gave testimony that supported Killian's innocence, but that Killian's attorney never called these witnesses. If DeSantis had been called to testify, or if his prior statement was admitted as a co-conspirator statement, the jury would have discovered that Masse told DeSantis that JoAnn Masse was the woman who assisted in the first attempt to rob the Davies. Exh. 36:10365. DeSantis also testified that Masse had been solicited by "some people" not just one person. Exh. 36: 10357. More importantly, DeSantis testified that he

had never met petitioner, and she had no involvement in the attempted crime. Exh. 36: 10351, 10377.

In the absence of other facts, the court was clearly concerned that petitioner's trial counsel did not attempt to have DeSantis testify at petitioner's trial, or if DeSantis refused to testify because of Fifth Amendment problems, that counsel did not attempt to introduce the trial transcript referenced above claiming that DeSantis was "unavailable." Thielen could not verbalize any legitimate reason why he would not have attempted to get DeSantis' testimony before the jury. RT 140.

However, the court need not determine whether DeSantis would have testified, or whether the testimony would have been permitted, because respondent introduced an exhibit at evidentiary hearing, the substance of which would have nullified the favorable DeSantis testimony. In a statement made to police officers in 1982, a person by name of Tommy Hammit stated:

> Okay. Well, I was first approached by Steven DeSantis...he wanted me to help him out in a burglary of a house...He told me that it was gold and silver...and he said "Well I gotta interduce [sic] you to a coupla other people."...And I asked him "Well, do I know 'em?" He said, "You know one of 'em...Gary Masse....I said "Who's the other one?" He said "A girl"...then he told me that the girl ah...made all the arrangements with her boyfriend and her boyfriend was a ah...a dealer at a coin shop where this man came in....And so I said "Well, what's the girl's name?" And he only told me her first name. Her first name was Gloria.

Respondent's Exhibit L at 1538. See also RT 159.
Petitioner has produced no evidence that Hammit was not available to testify, or that DeSantis' prior testimony could not otherwise have been impeached by Hammit's statement. Clearly, DeSantis' testimony that he did not know Gloria

Killian would have been significantly impeached. The court cannot find that petitioner has met her burden on this issue to show that confidence in the outcome of her trial is undermined because her attorney did not introduce the referenced testimony of Steven DeSantis.

Selected portions of Neva Snyder's testimony at the DeSantis trial presented in this proceeding by petitioner indicate that she [Snyder] never "recalled" seeing Masse and petitioner together at her house, and that she never introduced them. Exh. 37 at 7734-35. She further testified that petitioner never asked her to call Masse (or anyone) on her behalf, which contradicts what Masse said. Exh. 37 at 7744. Snyder did at one point testify unequivocally that petitioner did not mention anything to her about a planned robbery. Exhibit 37 at 7833.

The court has reviewed the entire Neva Snyder transcript and finds it less than persuasive in terms of its ability to assist petitioner. Firstly, Snyder testified for the most part in terms of "not recalling" much about the substantive events, and the transcript makes her appear very evasive, e.g., "I've never seen the gun [murder weapon] before, *I don't think.*" See also: Q. "Did Gloria Killian ever tell you that she was upset because Gary Masse wasn't doing the job that she wanted done, and that she was going to get somebody else to do it? A. *Not that I know of.* I- I don't- (shakes head negatively.)" Exhibit 37 at 7832-33. She did not know who might have been at her house, including Masse, and made it sound as crowded as a truck stop on a busy interstate except the clientele were all of shady character. To make matters worse, in terms of the potential value of Snyder's testimony, Snyder was compelled to take the Fifth Amendment when it came to questions about her distribution of drugs to several people, including Gary Masse. Exhibit 37 at 7824.

Finally, Thielen did remember attempting to have his investigator interview Snyder for petitioner's trial, but remembered that Snyder was uncooperative. Rt 133-134, 167.

The court cannot find that Thielen was ineffective for failing to call Neva Snyder; nor can the court find that petitioner was prejudiced thereby. Neva Snyder would have caused petitioner more problems than her testimony was worth.

5. Claim of Failure to Impeach Mrs. Davies

Petitioner next argues that if the letter from Dr. McKennan regarding Mrs. Davies, described supra, was disclosed to the defense, then petitioner's trial attorney should have used this information to impeach this witness. Mrs. Davies testified that petitioner resembled the woman who came to the door one or two weeks before the crime. Prior to the trial, there were two instances in which Davies could not identify petitioner as the woman who came to the door. Since Davies' identification differed over time, the letter may have explained why. Further, petitioner claims that the letter would have also discredited Davies' testimony that it was not JoAnn Masse who had earlier knocked on her door.

In the order permitting this issue to be raised at evidentiary hearing, petitioner was advised that medical testimony would be necessary for the court to find that there was any substantial prejudice involved in failing to impeach the victim, Mrs. Davies, with medical information. That is, if Davies' memory were impaired because of medication, an expert would have to so state to a reasonable medical probability. No expert was called at evidentiary hearing to deal with the Davies' medical condition. The issue therefore has no merit.

6. Claim of Failure to Impeach Virgil Fletcher

As has been referenced previously, petitioner was living with Virgil Fletcher at or about the time of her arrest, and apparently were together in some fashion at the time of the robbery/murder. Petitioner argues that Fletcher's testimony that he first learned of the Davies' murder while watching television with petitioner, see Exh 43: 573-74, was inconsistent with his police statement in which he stated that he first learned of it when he called Gene Frazee on December 14, 1981. Exh.5

(HH). Significant to these inconsistent statements is Fletcher's testimony that while watching the news with petitioner, she exclaimed, "Oh, my God, look at that," when the Davies story came on. She then left for Neva Snyder's house. Exh. 43: 574, 576. Her reaction to the news was used by the prosecution to imply her guilt, and would have contained less weight if Fletcher had been impeached about it, according to petitioner. With other evidence incriminating Fletcher, petitioner argues that it was irresponsible of her attorney not to impeach this witness.

The court has previously addressed the fact that because of the relationship between petitioner and Fletcher, and because of Fletcher's interest in the coin shop frequented by the victim, Mr. Davies, and at times by petitioner, general impeachment of Fletcher for the purpose of implicating him in the crime would not have assisted petitioner. Moreover, even if Fletcher had heard about the crime before he and petitioner were watching the news reports on television, that fact does not necessarily mean that petitioner did not make the expressive statement that she is alleged to have made. While the impeachment in the narrow context of when Fletcher first heard about the murder may have had some minimal value, the impeachment was not a case breaker by any means.

7. Claim of Failure to Object to Prosecutor's Questions Regarding Petitioner's Exercise of Her Right to Remain Silent

Petitioner argues that with respect to the Doyle error outlined supra, her attorney did not object to most improper questions, and the few times he did object, it was on improper grounds, such as argumentative. The court has previously found that there was no Doyle error. Therefore, it could not have been ineffective for Thielen not to object on Doyle grounds.

E. Claim Five - Ineffective Assistance of Counsel Due to Attorney's Actual Conflict of Interest

According to petitioner, the actual conflict is that her trial attorney, Ray Thielen, Jr., was a partner with his father, Ray Thielen, Sr., in the law firm of Thielen & Thielen. Mr. Thielen, Sr. had represented Gary Masse in 1972 for an unrelated crime. Mr. Thielen, Jr. joined his father's firm in 1973. Petitioner argues that the senior Thielen's duty of loyalty and confidentiality extended to the other attorneys in his firm. Mr. Thielen, Jr. was appointed to petitioner's case in 1983.

In order to prevail on a claim of ineffective assistance of counsel based on conflict of interest, petitioner must show both that his counsel actively represented conflicting interests, and that an actual conflict of interest adversely affected his attorney's performance. See Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980). The conflict of interest must be one that in itself is determined as constitutionally impermissible and requires reversal, see, e.g., Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978), or it must be an actual conflict that resulted in an adverse effect on counsel's performance. The latter category is usually judged by the standards set forth in Cuyler v. Sullivan, 446 U.S. at 349-350, 100 S. Ct. at 1718-19, unless the alleged conflict is insignificant. The controlling Ninth Circuit explication of Cuyler is set forth as follows:

> [T]o obtain habeas corpus relief on the basis of the alleged conflict, Bonin must show: (1) that counsel actively represented conflicting interests, and (2) that an actual conflict of interest adversely affected his lawyer's performance.
>
> ***
>
> [I]n order to show the existence of an actual conflict, [petitioner] cannot simply show that the interests of the attorney and client might possibly have come into conflict, as a "reviewing court cannot presume that the possibility for conflict has resulted in ineffective

> assistance of counsel." [citation omitted] Rather, [petitioner] must show that his interests actually came into direct conflict with those of [his trial attorney].

Bonin v. Calderon, 59 F.3d 815, 825-826 (9th Cir. 1995).

If an actual conflict is shown, as well as an adverse effect from such conflict, the court may presume that petitioner has been prejudiced. Bonin, 59 F.3d at 827. However, Bonin also emphasized the necessity for a "workable" understanding of what is meant by a significant, actual conflict of interest:

> [M]inor or potential conflicts of interest often exist which might theoretically or conceivably affect an attorney's representation, but are not likely to do so. Such "potential" conflicts are insufficient under Cuyler. In the absence of an "actual" conflict which squarely places the interests of the client in opposition to those of the attorney, and is likely to compromise a reasonable attorney's ability to comply with his legal and ethical obligation to represent his client with undivided loyalty, the Cuyler standard cannot be met. If a mere "potential" or "theoretical" conflict does affect an attorney's representation in a particular case, the defendant is not without recourse. However, he cannot rely on Cuyler and obtain relief merely upon a showing of "adverse effect," but must instead make the showing required by Strickland that counsel's performance was objectively unreasonable and that he suffered prejudice as a result.

Bonin, 59 F.3d at 827.

This court assumes "without deciding that two law partners are considered as one attorney." Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3120 (1987). Although a conflict may be imputed to an associate in the same firm, it does not necessarily mean that an actual conflict exists. U.S. v. Patrick, 985 F. Supp. 543, 554 n. 4 (E.D. Pa. 1997). In fact, conflict by imputation is distinguishable from a direct conflict in that petitioner would have to establish that the attorney was acting

under an actual conflict and that it resulted in an adverse effect. Id. See also Burger, 483 U.S. at 783,107 S. Ct. at 3120 (concluding that where co-defendant in separate trial was represented by law partner of petitioner's counsel there was no actual conflict because "the overlap of counsel, if any, did not so infect [the petitioner's] representation as to constitute an active representation of competing interests").

Petitioner argues that since Thielen Sr. knew of Masse's mental problems, Thielen Jr.'s ability to attack Masse on these grounds was compromised by loyalty and confidentiality imputed to him. Further, Thielen Jr. never disclosed the conflict to either the court or petitioner. Petitioner specifically points to Thielen Jr.'s failure to cross-examine Masse about some prior criminal acts, and his failure to question Masse at all about his mental problems or drug use.

Based on the above, the court ordered this issue to be presented at evidentiary hearing. No evidence was submitted by petitioner on the issue. Petitioner has not therefore met her burden with respect to demonstrating an actual conflict or any type of prejudice.

F. Claim Six - Ineffective Assistance of Counsel on Appeal

Petitioner claims that her counsel on direct appeal, Julian Macias, was not effective because he failed to raise the claims of Doyle error and ineffective assistance by trial counsel. The Strickland standard cited above applies to appellate counsel. Alford v. Rolfs, 867 F.2d 1216, 1220 (9th Cir.1989).

Generally, in California and elsewhere, unless an error appears on the face of the record and the record is conclusive on the claim, ineffective assistance of trial counsel issues are *not* raised on appeal given that the issues involve matters outside the trial record. People v. Bean, 46 Cal. 3d 919, 944, 251 Cal. Rptr. 467, 482 (1988). Therefore, the court will not fault California appellate counsel for not raising ineffective assistance of trial counsel issues on appeal.

With respect to the Doyle issue, counsel cannot have been ineffective for not raising such an issue on appeal because this court has found no merit to the issue.

G. Claim Seven - Ineffective Assistance of Conflict-Free Counsel on Appeal -

Petitioner also asserts ineffective assistance by appellate counsel, Julian Macias, in failing to raise his own conflict *by virtue of his prior representation of co-defendant DeSantis at trial* and corresponding duty of loyalty and confidentiality. Alleged failures as a result of the conflict are asserted to include an ineffective assistance of counsel claim based on the exculpatory testimony of DeSantis and Neva Snyder, exculpatory testimony by DeSantis' wife that was harmful to DeSantis,[24/] and trial counsel's failure to join in DeSantis' motion in limine attacking Masse's competence and requesting a psychiatric evaluation. Petitioner contends that at the appellate level, DeSantis' appellate counsel, Mr. Spiegel, had requested that Macias withdraw due to the conflict, and when Macias refused, Mr. Spiegel formally requested disqualification with the court for the very reasons described here.

While not an actual conflict per se, see Gomez v. Garcia, 81 F.3d 95 (9th Cir. 1996), having a severed co-defendant's trial counsel in a capital case represent another related defendant on appeal presents extraordinary opportunities for actual conflict. Why petitioner's appellate counsel would place himself in such a situation is puzzling to say the least.

Nevertheless, although petitioner initially planned to call Macias at evidentiary hearing, she did not do so. Thus, the court cannot find that petitioner has demonstrated the requisite

---

24. Petitioner points to testimony by the defense investigator which indicates that Mrs. DeSantis would have been willing to testify on petitioner's behalf only if the trials had been severed so that she would not have been required to testify adversely to her husband.

actual conflict.[25/]

H. Claim Eight - Denial of Sixth Amendment Right to Fair Trial Due to Cumulative Violations of Due Process Rights and Right to Effective and Conflict-Free Counsel

In this ground, petitioner cites to the collective violations of claims one through five as violation of her federal constitutional rights.

There is no doubt that cumulative error can push the prejudice requirement over the edge. See Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). The court has found that Masse perjured himself at the state trial in several respects, including the "whole truth" about petitioner's involvement in the crime and Masse's own belief that he had a 12 year deal with the prosecution. The court has also found minimal error in Thielen's not calling Gary Smith as a witness. Although the court is troubled by the perjury of Masse, the court has assessed that prejudice on its own, and found it insufficient. There is so little other error with which to accumulate that prejudice that the court cannot find that petitioner should receive a new trial because of cumulative error. Either singularly or collectively, the court does not have "grave doubt" about the effect of any found error on petitioner's conviction. O'Neal v. McAninch, 513 U.S. 432, 115 S. Ct. 492 (1995).

I. Claim Nine - Denial of Sixth Amendment Right to Fair Trial Due to Cumulative Violations of State and Federal Rights etc.

Petitioner again argues that the cumulative effect of violations set forth in support of claims one through five violated both her federal and state rights, the latter principally

---

25. Perhaps present counsel realized that a finding of error here could at best only win petitioner another appeal. Very few of the issues raised in this habeas would have been appropriate on direct appeal.

under the California Constitution. Even if petitioner's reliance on state law as a basis for the granting of federal habeas corpus relief invokes some type of federal liberty interest, the claims herein are duplicative of those already addressed. No further analysis of this claim need be made.

CONCLUSION

Petitioner has demonstrated with her exhaustive habeas petition that she is probably not as morally culpable in the death of Mr. Davies and the injury to Mrs. Davies as may have been thought at the end of her trial. Nevertheless, she has not demonstrated any error which would call for vacating her conviction on legal grounds.

Accordingly, the court recommends that the petition for writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within twenty (20) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 25, 2000.

s/GREGORY HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:gh:035
killian.fr

APPENDIX E

FILED
MAY 17 2000

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN
Petitioner, No. CIV S-97-2024 GEB GGH P

vs.

SUSAN POOLE,
Respondent **ORDER**

Petitioner, a state prisoner proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B) and Local General Order No. 262.

On February 28, 2000, the magistrate judge filed findings and recommendations herein which were served on all parties and contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Both petitioner and respondent have filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. §636(b)(1)(C) and Local Rule 72-304, this court had conducted a de novo review of this case. Having carefully reviewed the entire file, this court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed February 28, 2000, are adopted in full; and

2. The petition for writ of habeas corpus is denied.

DATED: May 15, 2000

s/ Garland E. Burrell
UNITED STATES DISTRICT JUDGE

APPENDIX F

SUPREME COURT
FILED
SEP 17 1997
Robert Wandruff Clerk

Deputy

S057120

IN THE SUPREME COURT OF CALIFORNIA

IN RE GLORIA KILLIAN

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED

s/Mosk
Acting Chief Justice

(2)

No. 02-687

IN THE

SUPREME COURT OF THE UNITED STATES

SUSAN POOLE, Warden,
Petitioner,
vs.
GLORIA KILLIAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Respondent
GLORIA KILLIAN

* Counsel of Record

55 pp

Questions Presented

1. Is this case moot, given that Respondent was unconditionally released and discharged from custody on November 21, 2002, as a result of Petitioner's decision not to request a stay of the court of appeals mandate, and to allow judgment to be issued by the district court in accordance with the mandate, which provided the conditional writ of habeas corpus would issue discharging Respondent from custody unless Petitioner retried Respondent within ninety days?

2. Whether Petitioner's request for summary reversal on the ground that the court of appeals "refused to consider the State's *Teague*" argument should be denied, where the court of appeals did not refuse to consider the State's *Teague* argument, but rather rejected it, and cited in support of its rejection of the State's argument, two decisions of this Court which established that its grant of habeas relief was not based on application of a "new rule" within the meaning of *Teague*?

3. Did the court of appeals correctly conclude that the state court's summary and unexplained denial of Respondent's claim that the prosecutor's use of her post-arrest silence as evidence of her guilt was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), where the facts of this case are materially indistinguishable from the comparative pertinent facts in *Doyle*, and the state court nevertheless arrived at a result different from *Doyle*?

4. Did the court of appeals correctly conclude that AEDPA's deference did not apply to Respondent's perjured testimony claim, because as a result of the state court's denial of that claim without affording Respondent an evidentiary hearing, the evidence in support of the claim was adduced only at the federal evidentiary hearing, and thus the state court could not have made a proper determination of the merits of the claim?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities v

Statement of the Case 1

I. Certiorari Should Be Denied Because Killian's Unconditional Release and Discharge From Custody Renders Her Petition Moot And Precludes Further Review of the Judgment 10

II. Summary Reversal Is Not Warranted Under *Horn v. Banks*, Because the Court of Appeals Did Not Refuse to Consider the State's *Teague* Argument, But Instead Rejected It 16

III. The State Court's Summary, Unexplained Decision Upholding the Prosecutor's Use of Respondent's Silence As Evidence of Her Guilt Was Contrary to *Doyle v. Ohio* 20

IV. The Court of Appeals Correctly Concluded That AEDPA's Deference to State Adjudications Did Not Apply to Respondent's Perjured Testimony Claim 26

Conclusion 29

INDEX OF APPENDICES

APPENDIX A
Findings and Recommendations of the United States District Court for the Eastern District of California, dated Nov. 14, 2002 ..... A-1

APPENDIX B
Order of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... B-4

APPENDIX C
Judgment of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... C-8

APPENDIX D

Decree of the Court of the Court of Appeals for the Ninth Circuit, dated August 12, 2002 ..... D-9

APPENDIX E

Order of the United States District Court for the Eastern District of California, dated August 7, 2002 ..... E-11

APPENDIX F

Order of the Court of the Court of Appeals for the Ninth Circuit, dated July 30, 2002 ..... F-13

TABLE OF AUTHORITIES

CASES

Burdine v. Johnson,
87 F. Supp. 2d 711 (S.D. Tex. 2000) 12

Burton v. Johnson,
975 F.2d 690 (10th Cir. 1992) 12

Calderon v. Moore,
518 U.S. 149, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996) 13, 14

Doyle v. Ohio,
426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) 1, 8, 20

Hoffman v. Arave,
236 F.3d 523 (9th Cir. 2001) 17

Horn v. Banks,
___ U.S. ___, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002) 16, 17

In re Hall,
(1981) 30 Cal. 3d 408 19

Kibbe v. DuBois,
269 F.3d 26 (1st Cir. 2001) 24

Lane v. Williams,
455 U.S. 624, 102 S. Ct. 1322, 71 L. Ed. 2d 508 (1982) 13

Maleng v. Cook,
490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) 14

Mancusi v. Stubbs,
408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972) 13

McMillan v. Gomez,
19 F.3d 465 (9th Cir. 1994) 24

Michael Williams v. Taylor,
529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 ..... 23, 27, 29

Moore v. Calderon,
56 F.3d 39 (9th Cir. 1995) 14

Spencer v. Kemna,
523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1997) 13, 14

Teague v. Lane,
489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 16, 17, 18

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership,
513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994) 15

United States v. Agurs,
427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) 7, 17

United States v. Bagley,
473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) 17

United States v. Shue,
766 F.2d 1122 (7th Cir. 1985) 24

Weaver v. Thompson,
197 F.3d 359 (9th Cir. 1999) 27

STATUTES AND RULES

28 United States Code

Section 2254 ..... 10, 17

Section 2254(d) 8, 2, 27

Federal Rules of Appellate Procedure

Rule 23(b) 10

Rule 41(a) 10

California Penal Code

Section 1473 19

Statement of the Case

On December 9, 1981, Gary Masse and his cousin Stephen DeSantis carried out a home-invasion robbery in Sacramento, California. In the course of that crime, they murdered Edward Davies and attempted the murder of his wife Grace Davies.[1] Petitioner's Appendix (Pet App) A-2.

Several days later, an anonymous caller to a police hot line identified Masse and DeSantis as the perpetrators. On December 15, detectives interviewed JoAnn Masse, Gary Masse's wife. JoAnn Masse told the detectives the Davies robbery had been initiated and planned by a female named "Gloria," who had enlisted her husband to carry it out. Pet App A-3.

On December 16, police questioned Gloria Killian, who at the time was one semester short of obtaining her J.D. from McGeorge School of Law. The police advised Killian of her *Miranda* rights prior to questioning her, and also provided her a written statement of rights form, which specifically stated, "If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time." Excerpts of Record (ER) 1044. Killian answered questions for approximately two hours, and voluntarily accompanied the police to the station for further questioning. The police placed Killian under arrest at the station, and Killian immediately exercised her right to stop answering questions and remain silent. Reporter's Transcript of Trial

---

[1] The Petition For Writ of Certiorari states incorrectly that both "Grace and Edward Davies were murdered . . ." Petition For Writ of Certiorari ("Petition") at 3.

Proceedings (RT) 39-41; ER 107-08.

Gary Masse was taken into custody on December 17, 1981. Masse and Killian were charged by complaint and as co-defendants with first degree felony murder, attempted murder and related charges. A magistrate dismissed the charges against Killian due to insufficient evidence at the preliminary hearing in May, 1982. Masse was held to answer. Pet App A-3.

Masse was tried before a jury in May, 1983 and convicted of first degree murder. The jury also made a finding of special circumstances, which mandated that Masse's sentence of life imprisonment be without parole. Pet App A-3; Clerk's Record (CR) 2 (Ex I)

Within a matter of days after being sentenced, Masse contacted and met with detectives. Pet App A-3. Masse confirmed that his cousin Stephen DeSantis had committed the Davies robbery with him, and maintained that it was DeSantis who shot and killed Mr. Davies and attempted to kill Mrs. Davies. Gloria Killian had initiated the idea of robbing the Davies, Masse told the detectives. According to Masse, Killian had arranged to be introduced to him through a mutual acquaintance, and then negotiated with him to carry out the robbery, on the condition that she and "her people" get 50 percent of the proceeds. CR 2 (Ex GG)

Detectives located and arrested DeSantis who had been a fugitive since the commission of the crime. Killian, who had remained in the community after the dismissal of the charges against her, was re-arrested on June 16, 1983. The District Attorney charged DeSantis and Killian with first degree felony murder, attempted murder and related crimes. CR 2 (Ex KK 4) DeSantis and Killian were charged as co-defendants, but their cases were severed for trial.

DeSantis was tried first. DeSantis testified in his own behalf and admitted participating in the robbery, but maintained Masse shot the Davies, not him. DeSantis said he had never met Killian. Masse, DeSantis testified, told him it was his wife JoAnn who had tried unsuccessfully to gain entry to the Davies house on an earlier occasion, not Killian, as Masse now claimed. DeSantis was convicted and sentenced to death. Reporter's Transcript of DeSantis Trial (RTD) 10351, 10449, 10370-71; ER 776, 872-778.

After DeSantis' trial, the prosecutor wrote a letter to Masse's sentencing judge, telling the court he planned not to oppose a motion by Masse to strike the special circumstances allegation (which would make Masse parole eligible), subject to Masse's continued cooperation and testimony at Killian's forthcoming trial. The prosecutor never disclosed the letter to Killian. Reporter's Transcript of Evidentiary Hearing (RTEH) 315-317.

Masse's testimony at Killian's trial provided the evidentiary support for the prosecution's theory of the case. Killian was the "mastermind" behind the crime, according to Masse's testimony, who conceived of the idea to rob the Davies, recruited him to execute the idea, and was to get 50 percent of the proceeds. After the robbery-turned- murder was reported on television, Killian called him demanding her half of the proceeds, Masse testified. Pet App A-7, n.6.

Killian's attorney attempted to impeach Masse by asking him to admit he had an agreement with the prosecution which provided that in return for his testimony against Killian, his sentence would be modified. Masse said he hoped his sentence would be modified because he was testifying truthfully, but insisted "there weren't no bargains made." RT 351.

Killian testified in her own defense and denied any involvement in or knowledge of the offense. She testified on direct exam that she answered police questions initially, but stopped when she was placed under arrest. The prosecutor cross-examined Killian about her invocation of silence to suggest it was evidence of her guilt because it meant she had "something to hide." RT 981-982, 995-997.

In summation, the prosecutor deflected defense suggestions that Masse had an allegiance to the prosecution that undermined his credibility, telling the jury, "we have nothing to do with how much time Gary Masse serves." Pet App A-8.

The jury convicted Killian on all counts, and she was sentenced on April 8, 1986, to an overall term of 32 years to life. Pet App A-4

On April 21, Masse wrote the prosecutor's investigator saying he had "a verbal agreement" that in return for incriminating DeSantis and Killian, he would be re-sentenced to "no more then [sic] twelve years." Masse demanded enforcement of the deal, saying that, "I did my part all the way to the end. I even lied my ass off on the stand for you people."[2] Pet App A-7; ER 937-39 (emphasis added)

The investigator gave the letter to the prosecutor, but neither disclosed it to Killian or the court. Reporter's Transcript of Evidentiary Hearing (RTEH) 314-317; ER 737-42

Killian's convictions and the judgment were affirmed on direct appeal in an unpublished opinion filed August 28, 1987. ER 2, 17-21.

Killian filed a petition for a writ of habeas corpus with the California Supreme Court in October, 1996. The state court denied the petition in a one-sentence order filed September 17, 1997. Pet App F-1.

---

[2] Masse's letter included the following: "As far as I am concerned there was a verbal agreement of no more then twelve years. I been as up front and honest as I could be. I gave you DeSantis and Killian. I did my part all the way to the end. I even lied my ass off on the stand for you people....I'm not going for a life sentence. That's bullshit. Please don't make me fight with you people I want to get this over with so I can get down the road....I guess what I have to do is write the judge and let him know every thing that has happened from the very beginning until now. ER 937-39.

Killian's federal petition was filed October 27, 1997. CR 14. The magistrate judge granted Killian's request for an evidentiary hearing as to five of her claims. CR 26, 41, 42. Masse testified at the evidentiary hearing and admitted he intentionally testified falsely at Killian's trial when he denied the existence of a deal. Masse also testified that his trial testimony as to Killian's role and involvement in the offense was false and perjurious. RTEH 251, 261-263, 264, 279. Masse, while admitting his massive perjury, nevertheless maintained Killian was involved in the offense initially, and that he and DeSantis had "stopped using her" before the crime was committed. RTEH 233-234.

The magistrate judge recommended the petition be denied. In particular, the magistrate judge ruled Masse's false trial testimony did not entitle Killian to relief, because while it may have overstated, "from a moral culpability perspective," her "degree of complicity," Masse's new version of Killian's involvement in the offense at the evidentiary hearing meant she was "not actually innocent," and "legal guilt, not degree of moral complicity, is at issue here." Pet App D-29. The district court adopted the magistrate judge's report and denied relief. Pet App E.

The court of appeals reversed, finding Killian was entitled to relief on three individual claims, as well as her cumulative error claim. Pet App A-6-13.

Before concluding Killian was entitled to relief on her perjured testimony claim, the court of appeals explained that because the state court had denied that claim

without granting Killian an evidentiary hearing, the evidence in support of the claim was first adduced at the federal evidentiary hearing. Pet App A-5. As a result, the state court could not have made a proper determination on the merits of that claim in accordance with the evidence presented at the federal evidentiary hearing, and therefore AEDPA's standard of review did not apply. Pet App A-5.

The factual findings of the magistrate judge and district court that Masse's trial testimony against Killian was perjured, both with respect to whether he had a deal to testify against Killian, as well as his testimony as to Killian's role and involvement in the offense were upheld by the court of appeals. Pet App A-6,7. "[T]he evidence indicating the prosecution should have known about Masse's perjury about his alleged deal is significant" the court of appeals noted. Pet App A-6, n.4. The court, however, found it unnecessary to make a finding of that fact because the perjury was sufficiently material to the verdict to entitle Killian to relief under the higher materiality standard that *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976) deemed applicable where testimony or evidence is effectively rendered false by the prosecution's unknowing failure to disclose exculpatory evidence. Pet App A-6.

The court of appeals ruled that Killian was also entitled to relief on her non-disclosure claim. In issuing that ruling, the court of appeals determined that the state court's summary and unexplained denial of the claim amounted to an "unreasonable

application" of the clearly established applicable federal law, under 28 U.S.C. § 2254(d).[3] Pet App A-9-11.

The third ground on which Killian was separately entitled to relief the court of appeals ruled, was her claim that the prosecutor impermissibly used her silence against her, in violation of due process. The state court's summary and unexplained denial of the claim, the court of appeals determined, was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976) Pet App 11, 12. In ruling Killian was entitled to relief on this claim, the court of appeals also considered and rejected Petitioner's argument that the prosecutor's use of Killian's silence did not violate *Doyle's* prohibition because it fit within the "cooperation exception" to *Doyle*. The court of appeals recognized the existence of the cooperation exception, but explained it could not be used here to justify the prosecutor's use of Killian's silence, because the prosecutor used Killian's silence not to rebut a claimed showing of cooperativeness, but instead as evidence of her guilt. Pet App A-11,12.

The court ultimately concluded and ruled that even if these individual claims "were not each sufficient to justify habeas relief," relief would still be required based on Killian's cumulative error claim. "[I]f ever there was a case for application of

---

[3] Petitioner does not dispute the correctness of the grant of relief by the court of appeals on this claim, nor does her petition request that it be overruled, altered or even reviewed.

cumulative error principles," the court explained, "this is it," because "[t]he collective presence of [the separate] errors is devastating to one's confidence in the reliability of this verdict and therefore requires, at the very least, a new trial."[4] Pet App A-13.

---

[4] The court of appeals did not address Killian's additional ground for relief that her trial counsel committed objectively unreasonable errors which individually and collectively prejudiced her, and thus deprived her of her Sixth Amendment right to effective assistance of counsel. Trial counsel's objectively unreasonable and prejudicial errors included his failure to: (1) procure DeSantis' testimony exonerating her from any involvement in the crime; (2) call as a defense the person Masse claimed introduced Killian to him (and who denied doing at DeSantis' trial); (3) present testimony from Gary Smith who, as confirmed by his testimony at the federal evidentiary hearing, would have testified that he and his wife had been solicited to commit the Davies robbery by Robert Hord, a Masse cohort and reputedly head of the Sacramento chapter of an outlaw motorcycle gang; Smith said he declined the offer but did make a silencer at Hord's request, which was found on the gun Masse used in commission of the Davies robbery; (4) impeach Masse with his extensive history of mental illness and drug abuse, which resulted in Masse being found incompetent to testify in his own behalf in an earlier prosecution. ER 7-9.

I.

Certiorari Should Be Denied Because Killian's Unconditional Release and Discharge From Custody Renders Her Petition Moot And Precludes Further Review of the Judgment

Respondent Killian invoked the jurisdiction of the district court pursuant to 28 U.S.C. section 2254. She contended her confinement was in violation of the federal Constitution on the ground that the state court trial which resulted in the conviction responsible for her confinement was constitutionally unfair. By her petition, Killian sought issuance of a conditional writ of habeas corpus, requiring that she be released from custody, unless the state provided her with a new trial within a reasonable time.

On March 13, 2002, the court of appeals filed its decision, and ordered the case "remand[ed] to the district court with instructions to grant the writ unless the state grants Killian a new trial within a reasonable time." Pet App A-13. Petitioner's filing of a petition for rehearing and suggestion of rehearing en banc automatically stayed issuance of the mandate. Fed. R. App. P. 41(a).

Petitioner's rehearing petition was denied August 2, 2002. Pet App B-1. On August 8, 2002, Killian was released on bail pursuant to Fed. R. App. P. 23(b), after posting a monetary bond, and subject to travel and residence restrictions, reporting obligations and other conditions restraining her liberty. Respondent's Appendix ("Resp App") B-6, E-11,12, F-13.

On August 9, 2002, Petitioner advised the district court that she had decided "not to request the Ninth Circuit to stay its mandate requiring [Killian] to be freed unless the State retries her within a reasonable time." Resp App A-1, Resp App B-4. The district court, in response to being advised by Petitioner of this decision, and after receiving the mandate, issued an order implementing the conditional writ of habeas corpus embodied by the court of appeals' mandate. Resp App B-4, Resp App D-9, 10. The district court specifically ordered that "unless formal retrial proceedings are commenced in state court against [Killian] within 90 days of the date on which this Order is filed, [Killian's] bail conditions shall terminate; thus exonerating her bond," resulting in her being discharged form all custodial restraints. Resp App B-6.

The district court's order was filed August 23, judgment was entered that same date, and the ninety day reasonable period of time the state had to initiate retrial proceedings began to run (and would expire November 21). Resp App B-4, C-8. Petitioner again had the choice of requesting a stay (concurrent with a request that the mandate be recalled) or allowing the judgment to be executed, in which case Killian would be discharged in ninety days, unless the State initiated formal retrial proceedings against her.

Petitioner did not seek to have the mandate recalled and stayed.[5] Nor did the State initial retrial proceedings against Killian within the ninety day period set by the district court's order. As a result, as of November 21, Killian's bail was exonerated and terminated, and she was released and discharged from all custodial restraints. As the district court's order explained, termination of Killian's bail conditions and exoneration of her bond would effect her "release," which the district court equated with issuance of the conditional writ. Resp App B-6, 7, n.2 (citations omitted)

Where, as here, a court issues a conditional writ of habeas corpus, and "the state chooses not to act or timely obtain a stay, and fails to cure the error within the deadline established by the federal court in the conditional writ, the writ issues and the prisoner must be released."(citations omitted)) *Burdine v. Johnson*, 87 F. Supp.2d 711, 716 (S.D. Tex. 2000); *Burton v. Johnson*, 975 F.2d 690, 693-694 (10th Cir. 1992)("The District Court's conditional order ended the litigation and left nothing for the court to do but execute its judgment." . . . Neither party appealed the issue and, thus, neither party may raise the

---

[5] Petitioner did file a document ex parte on November 7, 2002, described as "Request For Stay," in which Petitioner stated she did not object to the exoneration of Killian's bond as of November 21, but requested the court require Killian to continue to report weekly by telephone to pretrial services for the stated purpose of making it easier to contact Killian if the state were to decide at some later time to retry her. Resp App A-2. The document cited no rule or statutory authority for its filing or for the relief it requested. Resp App A-2.

The magistrate judge issued a report and findings on November 14, recommending the request be denied for a variety of different reasons, and notified the parties that objections to the report and findings had to be filed within twenty days. Resp App A-3. Petitioner did not file objections within that time.

issue here. The parties have waived any challenge to the remedy. Thus, the remedy will be enforced as it stands.")

Killian's discharge provides the relief sought by her petition and renders it moot because it "no longer present[s] a case or controversy under Article III, § 2, of the Constitution." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983, 140 L. Ed.2d 43 (1997); *Lane v. Williams*, 455 U.S. 624, 633, 102 S. Ct. 1322, 71 L. Ed.2d 508 (1982)

It is true that a party's "obedience to the mandate of the Court of Appeals and the judgement of the District Court does not [necessarily render a case] moot . . ." *Mancusi v. Stubbs*, 408 U.S. 204, 206-207, 92 S. Ct. 2308, 2310, 33 L. Ed.2d 293 (1972) (footnote omitted) It does in this case, however, because execution of the judgment in accordance with the mandate of the court of appeals, precludes Petitioner from being able to obtain the redress she seeks from a favorable judicial decision. *Spencer v. Kemna*, 523 U.S. at 7, 118 S. Ct. at 983, 140 L. Ed.2d at 50; *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067, 135 L. Ed.2d 453 (1996)("an appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant . . .")*quoting*, *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133, 40 L. Ed.2d 293 (1895).

The redress Petitioner seeks from a favorable decision is Killian being returned to prison to serve the remainder of her sentence. The execution of the judgment precludes

Petitioner from being able to obtain that redress, because it resulted in Killian's unconditional release and discharge from all custodial restraints, which thereby terminated the basis for the Court's exercise of jurisdiction over her.[6] *Maleng v. Cook*, 490 U.S. 488, 490-491, 109 S. Ct. 1923, 104 L. Ed.2d 540 (1989)(*per curium*) Having allowed jurisdiction over Killian to lapse, the State may not simply reassert it and take her into custody, absent the issuance of new process, in accordance with law.

Petitioner would not be entitled to, or able to obtain, the redress she seeks from a favorable decision on her petition for another reason. Petitioner does not dispute the correctness of, or seek review of, the Ninth Circuit's ruling that Killian was separately and independently entitled to habeas relief because the state court's denial of her non-disclosure claim was based on an "unreasonable application" of clearly established federal law. Pet App A-9, 11. Consequently, a favorable decision on the petition would not support a reversal of the judgment because it would still be supported by this independent, and unchallenged, basis for the grant of relief.

Because the case is moot, certiorari should be denied. *Spencer v. Kemna*, 523 U.S. at 18, 118 S. Ct. at 988 ("[M]ootness, however, it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do

---

[6] This case is therefore unlike *Calderon v. Moore*, *supra*, because Moore was not discharged from custody due to issuance of the conditional writ, but rather was "release[d] pending appeal," which was Killian's status prior to November 21, 2002. *Moore v. Calderon*, 56 F.3d 39, 40 (9th Cir. 1995)(dissent from order denying stay)

so."); *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21, 115 S. Ct. 386, 390, 130 L. Ed.2d 233 (1994), *quoting Walling v. Reuter, Co., Inc.*, 321 U.S. 671, 677, 64 S. Ct. 826, 88 L. Ed.2d 1001 (1944) ("'If a judgement has become moot [while awaiting review], this Court may not consider its merits . . . '")

II.

Summary Reversal Is Not Warranted Under *Horn v. Banks*, Because the Court of Appeals Did Not Refuse to Consider the State's *Teague* Argument, But Instead Rejected It

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989) holds that a federal habeas court may not to grant relief to a state prisoner based a "new rule" of constitutional law. "[F]ederal courts must address the *Teague* question when it is properly argued by the government . . ." *Horn v. Banks*, ___ U.S. ___, 122 S. Ct. 2147, 2148, 153 L. Ed.2d 301, 304 (2002), *citing*, *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed.2d 236 (1994)

In *Horn v. Banks, supra*, the Court summarily reversed the Third Circuit because it refused to consider the *Teague* question, even though it was properly argued by the government. 122 S. Ct. at 2149, 153 L. Ed.2d at 306. Petitioner seeks summary reversal in this case based on *Banks*, asserting the Ninth Circuit in this case, like the Third Circuit in *Banks*, "refused to address the *Teague* question." Petition 7.

In *Horn*, the Third Circuit stated affirmatively it was *not* addressing the *Teague* question and explained it was not doing so because it "found '*Teague* not to govern [its] analysis'. . ." *Horn v. Banks*, 122 S. Ct. at 2149, 153 L. Ed.2d at 306, *quoting*, *Banks v. Horn*, 271 F.3d 527, 541, and n.13 (3rd Cir. 2001). This Court summarily reversed, on the

ground that the Third Circuit's ruling that *Teague* did not govern its analysis was incorrect. *Id.*, 122 S. Ct. at 2149. The basis for the summary reversal in *Banks* is not present here because the Ninth Circuit, unlike the Third Circuit, did not find *Teague* inapplicable to its analysis.

The Ninth Circuit has recognized that "[o]nce the state raises the *Teague* defense, [it is] compelled to address whether *Teague* applies before determining the merits of the claim." *Hoffman v. Arave*, 236 F.3d 523, 537 (9th Cir. 2001) Unlike in *Horn v. Banks*, there is no reason to believe that the Ninth Circuit misconstrued the 1996 amendments to 28 U.S.C. § 2254 as altering the applicability of *Teague v. Lane* in post-AEDPA cases. Indeed, had the Ninth Circuit found that Congress had effectuated such an important revision of habeas corpus jurisprudence, it is inconceivable it would have omitted any discussion of this significant development in its written decision.

The decision by the Ninth Circuit establishes that the *Teague* defense, rather than being ignored, was simply rejected by the court based on its conclusion that the rule it was applying was dictated by precedent in existence at the time Respondent's conviction became final. This is established by the panel's citation of decisions of this Court which predate the date Killian's conviction became final on direct review as support for the rule of constitutional law it determined entitled Killian to relief -- *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985) and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976). Pet App A-6. That the three

judge panel neglected to expressly discuss the *Teague* issue may be explained by the cursory manner in which it was raised by Petitioner in her brief.[7]

In Petitioner's rehearing petition, the *Teague* issue was again raised before the Ninth Circuit. Respondent was ordered by the panel to respond to the petition. The petition was still pending before the Ninth Circuit at the time this Court issued its per curium reversal in *Horn v. Banks*. Although Petitioner failed to notify the Ninth Circuit of this development, a curious omission given Petitioner's current assertion that the Ninth Circuit was guilty of the identical error as the Third Circuit, it is reasonable to assume that the Ninth Circuit was aware of the *Banks* ruling by the time it denied Petitioner's rehearing petition on August 2, 2002. Pet App B-1. Had the panel in fact failed to consider the *Teague* defense at the time of the initial decision, certainly Petitioner's rehearing request would have been granted.

In short, Petitioner's contention that a properly raised *Teague* defense was ignored in this case is unsupported by, and is, in fact, contradicted by, the record.

---

[7] The single sentence in Petitioner's thirty-six page appellate brief to the panel that referenced or cited *Teague* stated the following: "To the extent that Petitioner is attempting to fabricate a claim based solely upon the allegation that Masse lied at trial, such claim would be barred under both 28 U.S.C. § 2254(d)(1) and the rule of *Teague v. Lane*, 489 U.S. 288 (1989)" Appellee's Brief, p. 16. Petitioner did not explain or expand upon that assertion. Petitioner never argued why *Teague* would bar such relief; indeed, Petitioner never identified what new rule she contended would be implicated by granting relief on that basis, much less why it qualified as a new rule.

Assuming without conceding this single sentence is sufficient for the State to have "properly argued" the *Teague* question, the court of appeals adequately addressed it.

The Petition for Certiorari does not request the Court to grant full review on any issue related to *Teague* or its application, and instead specifically requests only that the "Court summarily reverse for reconsideration in light of *Horn v. Banks*." Petition at 7. To the extent the Petition might be deemed to seek relief related to *Teague* other than summary relief in light of *Horn v. Banks*, it should be denied because the Petition cites no basis for granting such review, and none exists.

The decision of the court of appeals in this case is not "in conflict with the decision of another United States court of appeals on the same important matter," and Petitioner does not contend otherwise. Supreme Court Rule 10. Nor can Petitioner seek review on the ground that the court of appeals "decided an important federal question in a way that conflicts with the decision by a state court of last resort," (*Id.*), because the California Supreme Court, as well as California statutory law, recognize the rule that Petitioner contends the federal court should not have applied as a basis for granting Killian relief - - where perjured testimony or other false evidence is presented which is material to the verdict, meaning that there is a reasonable probability the outcome of the trial would have been different had the false evidence not been presented, the defendant is entitled to a new trial, even if the prosecution did not know or have reason to know, the evidence was false. California Penal Code section 1473; *In re Hall* (1981) 30 Cal.3d 408, 424.

III.

The State Court's Summary, Unexplained Decision Upholding the Prosecutor's Use of Respondent's Silence As Evidence of Her Guilt Was Contrary to *Doyle v. Ohio*

This Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S. Ct. 2240, 2241, 49 L. Ed.2d 91 (1976) clearly established that where a defendant is advised of her *Miranda* rights, and thereafter invokes her right not to answer questions, the Due Process Clause prohibits a prosecutor from using the defendant's silence against her at trial.

The police advised Killian of her *Miranda* rights before questioning her, and also provided her with a written statement of rights form, which specifically stated, "If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time." ER 1044. Killian answered questions for approximately two hours, and voluntarily accompanied the police to the station for further questioning. The police placed Killian under arrest at the station, and she immediately exercised her right to stop answering questions and remain silent. RT 39-41.

At trial, the prosecutor used Killian's post-arrest silence against her. He did so by repeatedly questioning her during cross-examination about why she had invoked her right to silence, suggesting it was evidence of her guilt, because it meant she had "something to hide" and that if she "had nothing to hide," she would not have

exercised her right to remain silent and instead explained to the police why she "had nothing to do with this crime[.]"[8]

---

[8] Q: And when you talked to them [the police] you had nothing to hide; did you?

A: No.

Q: And when they arrested you, was there some reason why you decided that you had told them enough?

A: Yes.

Q: What?

A: A person should never speak to anyone without the presence of an attorney.

Q: What did you have to hide.

A: I had nothing to hide.

Q: Why did you stop talking to them?

A: Because that is good sound legal advise.

Q: Isn't it just as good sound legal advise not to talk to them at all?

RT 981-982

An objection to the last question was sustained, but the prosecutor returned to the subject of Killian's silence a short while later in his cross-examination:

Q: Now do you have something to hide when you told the officers you didn't want to talk to them any more?

A: No.

Q: Wasn't it a fact that because Virgil Fletcher had not been arrested you figured you could have done the same thing, and when you couldn't talk your way past them you decided not to say anymore? Isn't that what happened?

A: I refused to talk to them anymore because they had placed me under arrest. It was obvious that they didn't --

Q: Didn't you feel like, hey, wait a minute, I can explain this?

A: There is no point to continue to talk after you have been arrested.

Q: How do you know that?

A: From law school.

Q: You learned that in law school?

A: That is the first piece of advice you learn in criminal law. It is best to have an attorney present.

Q: Uh-huh. Well, why didn't you -- my question remains though, if you had nothing to hide, why didn't you explain to the officers further, try and explain to them further so that they would understand that you had nothing to do with this crime?

Killian alleged in her state court habeas petition that the prosecutor's use of her post-arrest invocation of her right to remain silent contravened this Court's decision in *Doyle*. The state court summarily denied the claim, without explanation, in a one-sentence order. Pet App F-1. The Ninth Circuit afforded the state court's adjudication of Killian's *Doyle* claim the deference required by 28 U.S.C. § 2254(d). The court concluded the state court's "determination of this issue . . . was contrary to established Supreme Court law," and thus ruled the violation of Killian's due process rights under *Doyle* entitled her to habeas relief under 28 U.S.C. § 2254(d). Pet App A-12.

Petitioner seeks *certiorari* review of this decision on the ground that it "conflicts with *Williams v. Taylor*, 529 U.S. 362, 412 (2000), because it fails to apply the standards set by this Court for evaluating state court adjudications," and "also conflicts with *Kibbe v. Dubois*, 269 F.3d 26 (1st Cir. 2001) on the same issue." Petition at 8.

Defense counsel objected again and the objection was sustained. In addition to sustaining the objection, the trial judge called the attorneys to side-bar and expressed his concern about the examination:

THE COURT: Kit, I just have some concern about pressing -- I just remember some case that said that if someone wants to avail themselves of their right not to, to say, testify or raise the Fifth Amendment, that to do so is not to be used to presume that they are hiding something.

MR. CLELAND: I understand that. The way it has been developed by them I feel there is some redress.

THE COURT: I think you are treading on very dangerous ground and you could end up with a real problem.

MR. CLELAND: I understand.

RT 995-997

The Ninth Circuit correctly determined that under the standards this Court articulated in *Michael Williams v. Taylor, supra,* for evaluating state court decisions under section 2254(d), the state court's unexplained denial of Killian's claim was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio, supra.* "A state-court decision [is] . . . contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Michael Williams v. Taylor*, 529 U.S. at 426, 120 S. Ct. at 1519-1520.

The facts of this case are materially indistinguishable from the facts of this Court's decision in *Doyle* because in this case, as in *Doyle*: (1) Killian was advised by police that she had the right to remain silent; (2)she was advised that if she invoked that right, her silence could not be used against her at trial; (3) she invoked her right to silence; and (4) the prosecution used her silence against her at trial, contrary to what she was advised before she invoked the right to remain silent.

Petitioner contends that *Doyle* does not compel a result contrary to the state court's denial of Killian's claim because the facts of this case are "materially distinguishable" from *Doyle*. Petition at 11. The single fact Petitioner cites in support of that contention is that Killian "attempted to portray herself as cooperative during questioning." Petition at 11.

There is circuit court authority for the proposition that a defendant's attempt to portray herself as cooperative, as Killian is claimed to have done here, allows the prosecutor to question the defendant to rebut the showing of cooperativeness. This is the same argument Petitioner made to the court of appeals - - that the prosecutor's contravention of *Doyle's* prohibition against a prosecutor using a defendant's silence against her at trial was rendered permissible in this case by the "cooperation exception" to *Doyle*. The "cooperation exception" provides that "when a defendant has created the impression through his testimony and defense presentation that he fully cooperated with the authorities when, in fact, he had not," a prosecutor may rebut his claimed showing of cooperation. *Kibbe v. DuBois*, 269 F.3d 26, 34 (1st Cir. 2001)

The Ninth Circuit acknowledged the existence of the cooperation exception under circuit court law, including its own decision in *McMillan v. Gomez*, 19 F.3d 465 (9th Cir. 1994). Pet App A-12. It explained the exception did not apply here, however, because the prosecutor's use of Killian's silence exceeded the permissible bounds of the cooperation exception. The prosecutor did not use Killian's silence "to refute the impression of cooperativeness," but as evidence of guilt. As the First Circuit explained in finding the cooperation exception inapplicable in *Kibbe*, "[t]he Commonwealth, having emphasized Kibbe's silence to suggest that his story was 'not worthy of believing,' cannot now justify its actions through the safe harbor of the cooperation exception to *Doyle's* prohibition." 269 F.3d at 35; *United States v. Shue*, 766 F.2d 1122,

1130 (7th Cir. 1985)("[W]hile the government may use a defendant's post-arrest silence to impeach testimony about the circumstances of an arrest, the government may not then argue that the defendant's silence was inconsistent with this claim of innocence.")

Petitioner concedes that the prosecutor violated the scope of the cooperation exception, and contravened *Doyle*, if he used Killian's silence to do more than rebut her claimed showing of cooperativeness. Petition at 11. The issue here then turns on whether the prosecutor's questions to Killian during cross-examination about her invocation of silence were limited to showing she was not cooperative.

To rebut Killian's claimed showing of cooperativeness, the prosecutor only needed to establish that Killian stopped answering questions. Killian readily admitted that fact. The prosecutor's questions to Killian about her silence far exceeded eliciting evidence of uncooperativeness; they used Killian's silence against her as evidence of guilt. Given the nature of the prosecutor's questions, it would be objectively unreasonable to conclude otherwise.

Accordingly, Petitioner's attempt to justify the prosecutor's use of Killian's silence against her at trial by reliance on the cooperation exception to *Doyle's* prohibition fails. That failure also dooms Petitioner's attempt to demonstrate that the state court's denial of Killian's claim was not "contrary to" *Doyle's* prohibition, as the Ninth Circuit correctly determined.

IV.

The Court of Appeals Correctly Concluded That AEDPA's Deference to State Adjudications Did Not Apply to Respondent's Perjured Testimony Claim

Killian's state petition stated as a ground for relief that her conviction was based on perjured testimony, given by Masse, in violation of due process. The state court ruled on and summarily denied that claim without affording Killian an evidentiary hearing. Pet App F-1.

Killian restated that same ground for relief in her federal petition. The federal magistrate judge granted Killian's request for an evidentiary hearing, ruling that it was necessary for a proper determination of the claim. At the federal evidentiary hearing, Killian called Masse as a witness. Masse's testimony and other evidence presented at the hearing, proved that Masse provided perjured testimony at Killian's trial with respect to whether he had a deal, i.e., his "motivation to testify at Killian's trial," and that his perjury also extended to his testimony with respect to Killian's role and involvement in the offense, i.e., "the very heart of whether and to what extent Killian was involved" in the crime. Pet App A-7.

Because the state court denied Killian an evidentiary hearing on her perjured testimony claim, the court of appeals explained, the evidence in support of the claim was first adduced at the federal evidentiary hearing. Pet App A-5. And because the evidence in support of the claim was first adduced at the federal evidentiary hearing, the court of appeals further explained, the state court obviously could not have made a proper determination on the merits of the perjured testimony claim in accordance with the evidence presented at the federal evidentiary hearing. *Id.*

This made AEDPA deference inapplicable to Killian's perjured testimony in two respects, the court ruled. "AEDPA deference does not apply to Killian's perjury testimony claim in this case," the court stated, "because the state courts could not have made a proper determination on the merits." Additionally, "[h]aving refused Killian an evidentiary hearing on the matter, the state court cannot argue now that the normal AEDPA deference is owed the factual determinations of the California courts." *citing, Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999), *cf. Michael Williams v. Taylor*, 529 U.S. 420, 444, 120 S. Ct. 1479, 146 L. Ed.2d 435 (state court denial of evidentiary hearing establishes cognizable cause for procedural default in not presenting claims to state court); *see* 28 U.S.C. § 2254(d)(AEDPA's standard of review only applies to a "claim that was adjudicated on the merits in State court proceedings . . ."

Petitioner's argument that this ruling of the court of appeals was in error, and should be reviewed by this Court on *certiorari*, is based on two incorrect assertions.

First, Petitioner incorrectly asserts "the Ninth Circuit observed that an evidentiary hearing was held in federal court, and that therefore, 'AEDPA's standard of review does not apply.'" Petition at 15, *quoting* Pet App A-5. The Ninth Circuit did not rule, state or suggest that AEDPA's standard of review did not apply because "an evidentiary hearing was held in federal court . . ." Petition at 15. Indeed, the complete sentence of the opinion that Petitioner partially quotes in making this incorrect assertion reads, "For claims for which no adjudication on the merits in state court was possible, however, AEDPA's standard of review does not apply." Pet App A-5 (emphasis added to the part of sentence quoted by Petitioner)

Second, Petitioner incorrectly asserts that "[n]o facts came to light in the federal evidentiary hearing that were not alleged in and assumed to be true by the state court." Petition at 17 (footnote omitted). This assertion reflects either a disturbing disregard for the record, or a degree of unfamiliarity with the record that is unbelievable. Most significantly, it was not until the evidentiary hearing that facts proving that Masse's trial testimony regarding Killian's role and involvement in the offense was perjured were established. Pet App D-18 & 19, n.7 ("[T]he court has held an evidentiary hearing, and facts presented to the supreme court have been clarified and supplemented herein. It is not possible to employ a deferential standard of review to application of law to facts, when the facts at issue before the state supreme court were not precisely the same as the supplemented facts before this court."(footnote omitted)

Conclusion

The petition should be denied because the case is moot. Alternatively, it should be denied because :

The Ninth Circuit, unlike the Third Circuit in *Horn v. Banks*, did not refuse to address the State's *Teague* argument, but rather considered it and rejected it; there is no basis then for granting Petitioner's request for summary reversal in light of *Banks;*

The Ninth Circuit correctly applied the standards this Court articulated in *Michael Williams v. Taylor*, for reviewing state court decisions under section 2254(d), in determining that the state court's summary and unexplained denial of Killian's claim that the prosecutor impermissibly used her silence against her at trial in violation of due process was "contrary to" this Court's decision in *Doyle v. Ohio;*

Given that the state court denied Killian an evidentiary hearing, and consequently the facts in support of her perjured testimony claim were first adduced at the federal evidentiary hearing, the Ninth Circuit correctly concluded that AEDPA's deference did not apply to that claim because the state court could not have adjudicated it on the merits in accordance with the evidence presented and facts proved at the federal evidentiary hearing.

Respectfully submitted,

William J. Genego, Esq.
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, California 90405
310-399-3259
Attorneys for Respondent
Gloria Killian

INDEX OF APPENDICES

Page

APPENDIX A
Findings and Recommendations of the United States District Court for the Eastern District of California,, dated November 14, 2002 ..... A-1

APPENDIX B
Order of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... B-4

APPENDIX C
Judgment of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... C-8

APPENDIX D
Decree of the Court of the Court of Appeals for the Ninth Circuit, dated August 12, 2002 ..... D-9

APPENDIX E
Order of the United States District Court for the Eastern District of California, dated August 7, 2002 ..... E-11

APPENDIX F
Order of the Court of the Court of Appeals for the Ninth Circuit, dated July 30, 2002 ..... F-13

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN,

Petitioner,

v.

SUSAN POOLE, Warden,

Respondent.

_____/

No. CIV. S-97-2024 GEB GGH P

FINDINGS AND RECOMMENDATIONS

Filed November 14, 2002

On August 23, 2002, the district judge issued an order of judgment pursuant to a Ninth Circuit mandate, received August 14, 2002, that this court grant petitioner's writ "'unless the state grants Killian a new trial within a reasonable time.'" See Order, filed August 23, 2002, p. 2. A separate judgment was entered the same day. The order allowed the state 90 days (from August 23, 2002) to determine whether to retry petitioner; if, after 90 days, the state does not commence formal retrial proceedings, bail conditions are to terminate and petitioner's bond is to be exonerated. Should, on the other hand, the state commence retrial procedures within the 90-day period, the federal bail order was to become ineffective as set forth in the order of the undersigned filed August 7, 2002.

On November 7, 2002, respondent filed an ex parte request for a stay of the judgment seeking to extend for 60 days the termination of bail conditions, now due to expire on November 21, 2002

(90 days from August 23, 2002), to allow the state more time to determine whether to initiate a new prosecution. Respondent asks that the bond be exonerated pursuant to the August 23, 2002 order but seeks to have the termination of the condition that petitioner report weekly to pretrial services be stayed for an additional 60 days beyond the pending November 21, 2002 deadline. This request is made by respondent for the avowed purpose of assuring that if the state decides to pursue another prosecution, petitioner can be conveniently located. Respondent also references a pending petition for certiorari in the Supreme Court.

Respondent sets forth no authority for a district court to stay a judgment pending a petition for a writ of certiorari in the United States Supreme Court. Fed. R. App. P. 8 applies to stays of matters on "appeal." Staying a mandate of a Ninth Circuit decision pending certiorari to the Supreme Court must be by Fed. R. app. P. 41, and only the Circuit court can grant such a stay. See also Supreme Court Rule 23 (authorizing an application to a Supreme Court justice for a stay of enforcement of a judgment when a party is seeking review of that judgment.[1]

Respondent's motion is more properly framed as a request for a modification of the judgment, rather than for a stay. A notice motion must be made under Fed. R. Civ. P. 60(b) for modification of a judgment, and the motion must meet the prerequisites of Rule 60(b). Judgment cannot be modified simply upon an ex parte stay request by respondent.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's November 7, 2002 ex parte request for a stay of a portion of the district court's August 23, 2002 judgment order be denied

---

[1] Under a former incarnation of Rule 23, Supreme Court Rule 44, a party might seek a stay from the district court in such a context as this. However, the change of wording in Rule 23 appears to require that a court staying judgment pending review by the Supreme Court have independent authority to enter a stay.

PUBLISHER'S NOTE:

Page(s) A-3 **missing in original.**

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN, Petitioner, v. SUSAN POOLE, Warden, Respondent.	**CIV. S-97-2024 GEB GGH P** **ORDER**

Filed August 23, 2002

On August 9, 2002, Respondent lodged a proposed Order advising the court of her decision not to request the Ninth Circuit to stay its mandate requiring the Petitioner to be freed unless the State retries her within a reasonable time. In addition, Respondent requests that the order which the District Court issues conditionally granting the writ allow time for the State of California to decide whether to file a petition for writ of certiorari in the United States Supreme Court, and for the Sacramento County District Attorney's Office to determine whether to retry Petitioner. Respondent asserts that since she has until October 31, 2002, to file a petition for writ of certiorari, and because of the uncertainty attendant to that possible filing, she should not be required to notify the Court about whether the Sacramento County District Attorney intends to retry Petitioner until the period within 30 days after denial of the petition, or within 30 days after the decision is made not to file a

petition. Respondent asserts that although the Sacramento County District Attorney's Office has begun reviewing the case to determine whether to retry Petitioner, it would be premature for that office to initiate further state proceedings against Petitioner since the State is still considering whether a writ of certiorari will be filed in the United States Supreme Court.

Respondent does not indicate when trial proceedings are likely to commence. Respondent does shed light on factors involved with that decision by mentioning the lengthy passage of time since the trial in this case and the difficulties the Sacramento County District Attorney's Office anticipates locating witnesses and gathering physical evidence. Respondent also states that the Sacramento County District Attorney's Office stated "that an investigator will shortly be assigned to the case." (Proposed Order at 2.)

The Ninth Circuit mandate, which was received August 14, 2002, remanded this case "to the district court with instructions to grant the writ unless the state grants Killian a new trial within a reasonable time." Killian v. Poole, 282 F.3d 1204, 1211-12 (9th Cir. 2002).

> Federal courts pursuant to their authority to dispose of habeas matters as "law and justice require" often delay a state prisoner's release from custody for a reasonable time to allow the state an opportunity to correct the constitutional defects that make the custody unlawful.

Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992). The Ninth Circuit's instructions require the District Court to accord the State of California a reasonable opportunity to decide whether Petitioner should be retried before a release order issues. See Collazo v. Estelle, 940 F.2d 411, 426 (9th Cir. 1991), cert. denied, 502 U.S. 1031 (1992) (case "remanded to the district court to issue writ and to determine a reasonable time in which the State of California [was to] retry the petitioner . . . or release him"); see also Irvin v. Dowd, 366 U.S. 717, 729 (1961) (where the Supreme Court reveals

that "on remand, the District Court should enter such orders as are appropriate and consistent with [remand instructions] which allow the State a reasonable time in which to retry petitioner.").

Respondent indicates that the State should be allowed to make the retrial decision late this year or after its writ of certiorari is denied. It is uncertain when that would occur. Respondent argues as follows when contending this position is consistent with the Ninth Circuit's instructions:

> The Ninth Circuit's opinion in this case instructs this Court to "grant the writ unless the state grants Killian a new trial within a reasonable time." Given the wide range of procedural avenues that are available in this case, respondent submits that it is "reasonable" for this Court's order to allow and account for those various possibilities.

(Proposed Order at 2.)

The Ninth Circuit's mandate contemplated that the State would be provided with a "reasonable time" only to undertake the investigation pertinent to the retrial decision. The question is how much time the State needs to conduct that investigation. Since this case concerns crimes committed 21 years ago, the state needs time to conduct its investigation.[1] Given the passage of time since this case was tried, the State's asserted difficulty in determining whether it should retry Petitioner, and the amount of time that has passed since the Ninth Circuit's mandate was received, the State will be provided time to make its decision whether Petitioner will be retried. But unless formal retrial proceedings are commenced in state court against Petitioner within 90 days of the date on which this Order is filed, Petitioner's bail conditions shall terminate; thus exonerating her bond.

---

[1] As stated in Vasquez v. Hillary, 474 U.S. 254, 280 (986), "long delays effectively eliminate the State's ability to reconstruct its case . . . . [T]he passage of time may make the right to retry the defendant a 'matter of theory only . . . .' Witnesses die or move away; physical evidence is lost; memories fade. For these reasons, the [Supreme] Court has noted that '[t]he greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.'" (Citations omitted.)

If the State commences retrial proceedings against Petitioner within this 90 day period, the federal bail order becomes ineffective as stated in the magistrate judge's order filed August 7, 2002.[2]

The clerk shall enter judgment forthwith.

IT IS SO ORDERED.

DATED: August 22, 2002

s/ GARLAND E. BURRELL, JR.

U.S. District Judge

---

[2] This decision just concerns Petitioner's release status, because "the state may ordinarily still rearrest and reprosecute [a suspect]. See Carter v. Rafferty, 781 F.2d 993, 998 (3rd Cir. 1986) (effect of granting writ was to release petitioner from custody from constitutionally unfair trial but did not impede right to retry defendant); Gardner v. Pitchess, 731 F.2d 637, 640 (9th Cir. 1984) (granting of writ of habeas corpus does not preclude retrial of defendant); United States ex rel. Craig v. Myers, 329 F.2d 856, 860 (3rd Cir. 1964 (same); United States ex rel. Lowry v. Case, 283 F. Supp. 744, 745 (E.D. Pa. 1968 (same)." Moore, 972 F.2d at 320. See also Foster v. Lockhart, 9 F.3d 722, 727-28 (8th Cir. 1993) (same).

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

GLORIA KILLIAN

CASE NUMBER:
CIV S-97-2024 GEB GGH P

v.

SUSAN POOLE

Filed August 23, 2002

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF AUGUST 23, 2002.

Jack L. Wagner,

Clerk of the Court

ENTERED: August 23, 2002

by: s/ K. Carlos, Deputy Clerk

APPENDIX D

APPENDIX D

Office of the Clerk

United States Court of Appeals for the Ninth Circuit

95 Seventh Street, P.O. Box 193939

San Francisco, CA 94119-3939

August 12, 2002

USDC, Sacramento

Eastern District of California (Sacramento)

Room 4-200

501 "I" Street

Sacramento, CA 95814

C.A. No.	TITLE	AGENCY/ D.C. NO.
00-16477	Killian v. Poole	CV-97-02024-GEB-GGH

Dear Clerk:

The following documents(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson

Clerk of the Court

By: Fred Taylor

Deputy Clerk

Enclosure(s)

cc: ALL COUNSEL

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN,

Petitioner,

v.

SUSAN POOLE, Warden,

Respondent.

/

CIV. S-97-2024 GEB GGH P

ORDER

Filed August 7, 2002

The Ninth Circuit has ordered petitioner in the above captioned action to be released with appropriate conditions pending further federal proceedings. This order shall be effective until such time as the State has commenced retrial proceedings, or has determined that petitioner shall be permanently released without retrial.[1]

Petitioner shall be released on the following conditions:

1. That she post a bond in the amount of $200,000.00 to be secured by the residence owned by Sally Ride located at 1249 North Holliston Ave., Pasadena, California 91104. Appropriate papers as discussed in court are to be filed by August 21, 2002; however, this release order shall be

[1] Once the state courts assumed jurisdiction over petitioner pursuant to the judgment of t his court, the federal courts would no longer have jurisdiction over petitioner's release or reincarceration.

effective on August 8, 2002.[2]

2. Petitioner is released to the third party custody of Joyce Ride; petitioner shall reside in the home of Ms. Ride, also located at 1249 North Holliston Ave., Pasadena, CA., and not change her residence absent approval by this court.

3. Petitioner shall not possess a firearm, destructive device, or other dangerous weapon.

4. Petitioner's travel is limited to the Central and Eastern Districts of California absent approval of other travel by Pretrial Services;

5. Petitioner shall not have possession of, or use, a narcotic drug or other controlled substance absent a prescription by a licensed medical practitioner; she shall abstain from the excessive use of alcohol. Petitioner shall notify Pretrial Services immediately of any prescriptions.

6. Petitioner shall report to Pretrial Services (Sacramento) on the first working day following her release from custody. Either Ms. Ride, or petitioner's counsel, shall accompany Ms. Killian to her first Pretrial Services contact. Petitioner shall abide by the rules and regulations of the Pretrial Services Agency.

Respondent's counsel shall cause this order to be personally communicated to the Warden where petitioner is presently incarcerated.

DATED: August 7, 2002.

s/ GREGORY G. HOLLOWS

UNITED STATES MAGISTRATE JUDGE

---

[2] If a logistical impediment precludes the use of the Ride property from being used as security, the court will reconsider this condition.

APPENDIX F

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLORIA KILLIAN,	)	No. 00-16477
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-97-02024-GEB-GGH
v.	)	Eastern District of California-
	)	Sacramento
SUSAN POOLE, Warden,	)	
	)	
Respondent-Appellee.	)	ORDER
	)	

Filed July 30, 2002

Before: HUG, D.W. NELSON and HAWKINS, Circuit Judges

The Motion of Petitioner Killian for release is granted, subject to such appropriate conditions of release as may be established by the district court. The district court shall hold a hearing thereon within 30 days of the filed date of this Order.

SO ORDERED.

COPY

No. 02-687

(3)

Supreme Court, U.S.
FILED
DEC 24 2002
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN POOLE, Warden, *Petitioner,*

v.

GLORIA KILLIAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-2785
Fax: (916) 324-2960
Counsel for Petitioner

15 pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE PETITION IS NOT MOOT	1
A. Killian's Release From Custody, In Accordance With The Ninth's Circuit's Opinion, Does Not Render The Case Moot	1
B. Because The Ninth Circuit's Opinion Contains No Discernible Holding Regarding The Non-Disclosure Claim, Reversal On The Grounds Urged By Petitioner Will Permit A Favorable Result Upon Remand	2
II. THE NINTH CIRCUIT ANNOUNCED A NEW RULE OF LAW IN VIOLATION OF *TEAGUE*	5
III. THE STATE COURT DENIAL OF RELIEF WAS NOT "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW	8
IV. THE NINTH CIRCUIT'S REJECTION OF AEDPA'S DEFERENTIAL STANDARD OF REVIEW CREATES A SPLIT OF AUTHORITY AMONG THE CIRCUITS	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases

Brady v. Maryland
373 U.S. 83 (1963) 3, 4

Burton v. Johnson
975 F.2d 690 (10th Cir. 1992) 2

Calderon v. Moore
518 U.S. 149 (1996) 1, 2

Cardinal Chemical Co. v. Morton International, Inc.
508 U.S. 83 (1993) 4

Doyle v. Ohio
426 U.S. 610 (1976) 8, 9

Early v. Packer
___ U.S. ___, 123 S.Ct. 362 (2002) 7

Griffin v. California
380 U. S. 609 (1965) 9

Kibbe v. Dubois
269 F.3d 26 (1st Cir. 2001) 9

Lewis v. Continental Bank Corp.
494 U.S. 472 (1990) 2

Newsome v. McCabe
256 F.3d 747 (7th Cir. 2001) 3

Pecoraro v. Walls
286 F.3d 439 (7th Cir. 2002) 9

Seven Words LLC v. Network Solutions
260 F.3d 1089 (9th Cir. 2001) 4

Spencer v. Kemna
523 U.S. 1 (1997) 2

Teague v. Lane
489 U.S. 288 (1989) 5, 6

United States v. Agurs
427 U.S. 97 (1976) 4, 5

United States v. Bagley
473 U.S. 667 (1985) 6

United States v. Endicott
869 F.2d 452 (9th Cir. 1989) 7

United States v. Lord
710 F. Supp. 615 (E.D.Va. 1989) 3

United States v. Robinson
485 U.S. 25 (1988) 9

United States v. Sanchez
251 F.3d 598 (7th Cir. 2001) 3

United States v. Young
17 F.3d 1201 (9th Cir. 1994) 6

Valdez v. Cockrell
274 F.3d 941 (5th Cir. 2001) 10

Woodford v. Visciotti
___ U.S. ___, 123 S.Ct 357 (2002) 8

Statutes

28 United States Code
§ 2254 8
§ 2254(d) 10

ARGUMENT

I.

THE PETITION IS NOT MOOT

In her Brief in Opposition, Killian contends the petition is moot. (Opp. at 10.) It is not.

A. Killian's Release From Custody, In Accordance With The Ninth's Circuit's Opinion, Does Not Render The Case Moot

Killian's first argument in support of mootness is an amalgam of arguments involving the fact of Killian's release from custody. That Killian has been released from prison pursuant to the judgment of the Ninth Circuit does not render the case moot. Killian was sentenced to a term of 32 years to life in prison for murder, and has yet to serve that full term. The very judgment of the Ninth Circuit which ordered Killian's release is the judgment upon which Petitioner is seeking certiorari review. If that judgment is reversed by this Court, Petitioner will seek to return Killian to prison to serve the remainder of her term. In *Calderon v. Moore*, 518 U.S. 149, 150 (1996), the Ninth Circuit had dismissed a merits appeal by the State as moot because the district court had ordered the habeas petitioner released, and the state had begun preparing for a new trial. This Court held in no uncertain terms that the case was not moot because, if the State was successful in its merits appeal, the Court of Appeals could grant the State "any effectual relief whatever" and save the State the burden of a new trial. *Id.* at 150-151. Presumably included in the type of relief available was an order to return the habeas petitioner to custody.

Killian's reference to the "case or controversy" requirement of Article III (*see* Opp. at 13) does not aid her argument. That requirement "subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties

must continue to have a 'personal stake in the outcome' of the lawsuit." *Spencer v. Kemna*, 523 U.S. 1, 7 (1997) quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990). As this Court noted in *Spencer*, however, the conditions satisfying the case or controversy requirement have relaxed over the years. 523 U.S. at 7-9. This Court now accepts "the most generalized and hypothetical of consequences as sufficient to avoid mootness." *Id.* at 10. If the judgment of the Ninth Circuit is reversed, Killian faces the prospect of a return to prison to serve the remainder of her term. This consequence is far from hypothetical, and serves to defeat Killian's claim of mootness.

Killian cites inapposite authority in support of her contention that her release renders the petition moot. (Opp. at 12-13.) *Burton v. Johnson*, 975 F.2d 690, 693-694 (10th Cir. 1992) is inapplicable because in that case, the state failed to appeal the judgment ordering the habeas petitioner's release. In this case, the state is seeking review of the Ninth Circuit opinion granting the writ. Killian's cursory claim that the State may not simply take her into custody (*see* Opp. at 14) is rebutted by the very authority cited in her brief. *Calderon*, 518 U.S. at 150.

B. Because The Ninth Circuit's Opinion Contains No Discernible Holding Regarding The Non-Disclosure Claim, Reversal On The Grounds Urged By Petitioner Will Permit A Favorable Result Upon Remand

In a related argument in support of the claim of mootness, Killian contends that even if this Court grants certiorari review and reverses on the questions presented in the petition, the judgment would remain the same. (Opp. at 14.) According to Killian, the Ninth Circuit ruled that she was "separately and independently entitled to habeas relief because the state court's denial of her non-disclosure claim was based on an 'unreasonable application' of clearly established federal law." *Id.* The flaw in this argument is that the Ninth Circuit made no such ruling.

The Ninth Circuit's determination that habeas relief was warranted was based on a determination that there was cumulative error. (Pet.App.A at 13.) In its discussion of the three individual claims of error, the court never stated that habeas relief was warranted. Indeed, a careful reading of the Ninth Circuit's analysis of the non-disclosure claim reveals that it is doubtful there was any holding as to the claim at all. (*See* (Pet.App.A at 9-11.) The analysis begins with a citation to *Brady v. Maryland*, 373 U.S. 83 (1963). However, the court focused on three undisclosed letters, one of which was not in existence at the time of trial. (*See* Pet.App.A at 10-11, n.8.[1]) The court then "considered collectively" the three letters. (Pet.App.A at 10.) It focused primarily on the statements contained in the letter that was not written by Masse until after Killian's trial. *Id.* at 10-11.[2]

At this point, however, the analysis by the Ninth Circuit necessarily changed course, undoubtedly due to the court's realization that *Brady* error could not be premised on evidence which did not exist until after trial had concluded. "*Brady* identifies a trial right." *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001). As the court observed in *United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001), "because the government cannot suppress evidence that does not exist at the time of the trial, there is no *Brady* violation" regarding evidence arising after trial. Similarly, in *United States v. Lord*,

---

1. One of the two letters in existence at trial was determined by the district court to be simply a record of the prosecutor's intentions, undisclosed to anyone, and therefore not subject to *Brady* at all. (Pet.App.D at 31-33, 44-45.)

2. The Ninth Circuit opinion contains only selective quotes from the letter (*see* Pet.App.A at 10) which are taken grossly out of context. A complete quote appears at Pet.App.D at 19, n.17. Notable in its absence from the Ninth Circuit's selective quotations is Masse's statement in the letter that "I been up front and honest as I could be. . . ." *Id.*

710 F. Supp. 615, 619 (E.D.Va. 1989), the court found that the *Brady* duty to disclose continues only until the day of sentencing. In fact, this Court has stated that *Brady* "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Because it is not at all clear that the *Brady* obligation continues after trial has concluded, or applies to evidence that comes into the possession of the prosecution after trial, the Ninth Circuit's opinion, based as it was on all three letters, could not properly complete the *Brady* analysis it had begun.

Presumably, the Ninth Circuit recognized this fact, which explains why their analysis concluded simply with a statement that the state courts and district court were wrong, without stating that the error warrants reversal. Pet.App.A at 11. In the cumulative error section, the opinion is even less clear. The court observed that "[e]ven if [the three individual errors] were not each sufficient to justify habeas relief, we note that if ever there were a case for application of cumulative error principles, this is it." Pet.App.A at 13. The opinion goes on to state that based on cumulative error, a new trial is warranted. *Id.* The qualifier "even if" used in the quoted sentence is telling, because it suggests uncertainty about whether the individual claims, including the non-disclosure claim, were sufficient alone to warrant habeas relief. More telling is the fact that nowhere in the opinion did the Ninth Circuit ever state that any of the individual claims warrant habeas relief. Language granting reversal and a new trial appears only in the cumulative error section.

It must be remembered that the party asserting mootness bears a heavy burden of demonstrating that there is no effective relief the court can provide. *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001). Given the lack of a holding that the non-disclosure claim independently warranted habeas relief, Killian cannot carry her burden.

If certiorari is granted and Petitioner is successful, then, upon remand, Petitioner can prevail in the Ninth Circuit, because the Ninth Circuit would have to determine whether the non-disclosure claim, standing alone, would warrant habeas relief. Moreover, if the Ninth Circuit attempted to rely on the post-trial letter to find a *Brady* violation, it would again be in violation of *Teague v. Lane*, 489 U.S. 288, 308-10 (1989), because this Court has never stated that the *Brady* obligation, including all of the appropriate remedies, continues post-trial. In sum, upon remand, the Ninth Circuit would be forced to conduct an altogether different calculus, which could certainly change the result. Therefore, the petition is not moot because Killian may well find herself subject to the state court judgment of conviction in the future.

II.

THE NINTH CIRCUIT ANNOUNCED A NEW RULE OF LAW IN VIOLATION OF *TEAGUE*

Killian contends that the Ninth Circuit implicitly rejected *Teague* by citing prior decisions of this Court. (Opp. at 17.) It is generally correct that an opinion relying upon decisions from this Court which predate finality will not run afoul of *Teague v. Lane*, 489 U.S. 288. However, the decisions cited by the Ninth Circuit do not support their novel rule of law. The fact that the decision below cited authority from this Court is irrelevant if those cited decisions do not support the rule announced by the Ninth Circuit.

The rule of law in question is the Ninth Circuit's conclusion that perjured testimony by a prosecution witness, without any finding that the prosecutor knew or should have known of the perjury, amounts to constitutional error. The Ninth Circuit decision opened its discussion of the perjury claim with a citation to *Agurs*, 427 U.S. at 103 for the settled proposition that the knowing use of perjured testimony warrants reversal. (Pet.App.A at 6.) Later in the same paragraph, the

Ninth Circuit cited *United States v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994), which in turn cited this Court's decision in *United States v. Bagley*, 473 U.S. 667, 682 (1985). Killian's contention that the references to *Agurs* and *Bagley* insulate the decision from any *Teague* analysis is specious.

In *Agurs*, this Court did in fact hold that "the knowing use of perjured testimony is fundamentally unfair. . . ." 427 U.S. at 103. Petitioner has no quarrel with this proposition. The problem lies in the fact that the Ninth Circuit expressly premised its decision on a determination that the prosecutor's knowledge of the perjury was irrelevant: "For this case, we assume without deciding that the prosecutor neither knew nor should have known of Masse's perjury. . . ." (Pet.App.A at 6.) The decision then cited the Ninth Circuit's prior decision in *Young* for the proposition that perjury, even absent knowledge by the prosecution, warrants reversal.

Young was decided in 1994, and thus was not in existence in 1988 at the time of finality, and therefore it is irrelevant to the *Teague* bar. Moreover, it fails to establish that a constitutional violation results from the mere presence of perjury absent knowing use by the prosecution. The *Young* opinion first states the rule prohibiting the knowing use of perjured testimony. 17 F.3d at 1203. One page later, however, the opinion announces a different rule:

> Thus, even if the government *unwittingly* presents false evidence, a defendant is entitled to a new trial "if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different." *Endicott*, 869 F.2d at 455 (citing *United States v. Bagley*, 473 U.S. 667, 678-80, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)).

17 F.3d at 1204, emphasis added. *Young* was a direct appeal of a criminal conviction in federal court. In such a posture, the Ninth Circuit may be free to interpret unsettled areas of constitutional law and grant relief as it sees fit. However, *Teague* expressly prohibits the same exercise of power in habeas. And, what is prohibited from being done directly

cannot be accomplished indirectly by simply citing a prior non-habeas case as authority for the new rule being applied in a habeas case. In fact, this Court has recently held that direct appeal cases "are off the table as far as §2254(d) is concerned." *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 366 (2002) (per curiam).

Moreover, neither *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989) nor *Bagley*, 473 U.S. 667 (1985), the two cases cited by *Young* for its novel restatement of the perjury rule, support *Young's* statement. *Endicott* simply stated that absent knowing use of perjury, new evidence may still be material under *Brady*. *Endicott*, 869 F.2d at 455. Similarly, *Bagley* said nothing about the perjury outside the context of knowing use by the prosecution. *Bagley*, 473 U.S. at 678-680.

The Ninth Circuit's sleight of hand must not be countenanced. Killian acknowledges, albeit grudgingly, that the *Teague* issue was raised, both in the original briefing and on rehearing. (Opp. at 17-18.) The Ninth Circuit flatly refused to address the *Teague* issue, opting instead to cite cases that do not in any way support the rule announced in the decision. Given this Court's stated preference for letting the lower courts "serve as laboratories," Petitioner has asked this Court to grant summary reversal on that issue. However, Petitioner has no objection to this Court taking up the issue and addressing *Teague* in the first instance.

Finally, Petitioner notes that Killian has grossly misstated the state of the law on the issue in question. Killian states that the decision of the court of appeals in this case is not in conflict with any other appellate court. (Opp. at 19.) Killian overlooks the fact that there exist published cases *from every single federal court of appeals in the country* holding that only the prosecutor's *knowing* use of perjury creates constitutional error. (*See* Pet. at 6, n,5.)

III.

THE STATE COURT DENIAL OF RELIEF WAS NOT "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit found error based on *Doyle v. Ohio*, 426 U.S. 610, 611 (1976) under the "contrary to" clause of 28 U.S.C. § 2254. (Pet.App.A at 12.) Killian acknowledges that ruling and attempts to defend it by arguing that the facts of this case are "materially indistinguishable" from *Doyle*. (Opp. at 23.) However, Killian then engages a lengthy explication of the "cooperation exception" which has been recognized in various federal appellate court decisions, and which is present and applicable in this case. (Opp. at 23-25.) Killian's own argument therefore demonstrates that this case is materially distinguishable from *Doyle*, and therefore, the Ninth Circuit's application of AEDPA was clearly erroneous.

In this case, a primary thrust of Killian's defense at trial was to portray herself as cooperative with police, and therefore innocent. The prosecutor sought to show the jury that her claim of cooperation was not consistent with her behavior, in that she lied to police for several hours, then invoked her right to silence once she realized that her lies were not convincing the police. Since *Doyle* did not involve any facts remotely similar to those in the instant case, the state court decision was not "contrary to" *Doyle*.

Moreover, Killian's argument that the cooperation exception does not apply to this case (*see* Opp. at 24) merely underscores the fact that the state court decision in this case was not "contrary to" federal law as determined by this Court. This Court has never expressly addressed the scope of the cooperation exception, much less rejected its application. In the absence of contrary authority, § 2254(d) "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, ___ U.S. ___, 123 S.Ct 357, 360 (2002) (per curiam). Thus, the Ninth Circuit's determination that the exception does

not apply to this case is a prime example of the errant reasoning referenced in *Kibbe v. Dubois*, 269 F.3d 26, 36-37 (1st Cir. 2001)(reversing grant of habeas relief on *Doyle* error because it is not enough for the federal court to merely disagree with the state court).

In a closely related context, this Court has previously indicated that the privilege against self-incrimination is to be used as a shield, and not a sword. *United States v. Robinson*, 485 U.S. 25, 32 (1988) (analyzing propriety of prosecutorial comment on right to silence under *Griffin v. California*, 380 U. S. 609 (1965)). In that same case, this Court observed that "prosecutorial comment must be examined in context." *Robinson*, 485 U.S. at 33. Petitioner submits the cooperation exception was particularly applicable in this case where Killian, a third year law student, attempted to mislead the jury by portraying herself as cooperative during questioning, and by explaining her subsequent invocation as simply "good sound legal advice" that she learned in law school. (Pet.App.D at 57-58.) The prosecutor was entitled to rebut Killian's attempt to portray herself as cooperative before the jury.

IV.

THE NINTH CIRCUIT'S REJECTION OF AEDPA'S DEFERENTIAL STANDARD OF REVIEW CREATES A SPLIT OF AUTHORITY AMONG THE CIRCUITS

Killian attempts to clarify the precise reason for the Ninth Circuit's failure to accord the state court decision any deference on the perjury claim. Regardless of the reason, the Ninth Circuit's failure to accord deference conflicts with the decisions of other circuit courts of appeal. In *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002), the court noted that the fact that a federal district court holds an evidentiary hearing may "bear on the reasonableness of the state courts' adjudication" but should not alter the deferential standard of review under

AEDPA. Similarly, in *Valdez v. Cockrell*, 274 F.3d 941, 946-47, 951-52 (5th Cir. 2001), the court concluded that even if a federal court grants an evidentiary hearing, its utility is in assessing the reasonableness of the state court determination; the hearing does not justify rejecting the state court determination altogether.

Because the Ninth Circuit's treatment of the perjury claim plainly contravened the mandate of 28 U.S.C. § 2254(d), and because their published decision conflicts with two other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: December 30, 2002

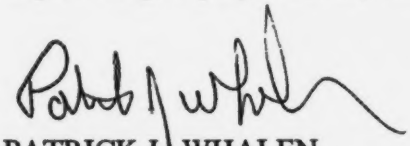
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

STAN CROSS
Supervising Deputy Attorney General



PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner